

1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF FLORIDA
 3 WEST PALM BEACH DIVISION
 4 CASE NO. 16-CV-80655-ROSENBERG

5 **JAMES TRACY,** .

6 Plaintiff, .

7 vs. .

8 **FLORIDA ATLANTIC UNIVERSITY** . West Palm Beach, Florida
BOARD OF TRUSTEES,

9 December 1, 2017

10 Defendant. .

11 VOLUME 3
 12 JURY TRIAL PROCEEDINGS
 13 BEFORE THE HONORABLE ROBIN L. ROSENBERG
 14 UNITED STATES DISTRICT JUDGE

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1 *THE COURT:* Okay, good morning. You may be seated.

2 Let me get set up here and take up any matters you
3 think need to be addressed in advance of our witnesses.

4 Okay, so what do we have on our plate for the next 20
5 minutes or so before the jury comes in?

6 *MS. GRIFFIN:* Holly Griffin with Gunster. We do have
7 Dr. Kajiura that is coming in this morning. Counsel, do you
8 have exhibits?

9 *MR. BENZION:* Two exhibits are already in evidence,
10 Plaintiff's 12, and I may be required to use 53 and 54, but I
11 don't intend to offer them into evidence.

12 *MS. GRIFFIN:* We object to 54, and with 53, we ask the
13 foundation be laid first. Number 54 is an arbitration opinion
14 that Dr. Kajiura has no personal knowledge of.

15 *MR. BENZION:* I do not intend to offer 54 into
16 evidence.

17 *THE COURT:* It shouldn't be discussed if he doesn't
18 have personal knowledge of it, he should be speaking about
19 something he has personal knowledge of. If he is relying on
20 something else, it is hearsay.

21 *MR. BENZION:* I agree with your Honor. I will ask him
22 about the discipline he lived through and personal experience.

23 *THE COURT:* And there is no issue on 53 as long as
24 there is a foundation laid?

25 *MS. GRIFFIN:* Providing there is a foundation laid.

1 *THE COURT:* Okay.

2 *MS. GRIFFIN:* With the arbitration opinion, we have a
3 403 objection.

4 *THE COURT:* It sounds like 54 is not coming in.

5 That is with Dr. Kajiura. Any issues with the
6 cross-examination of the Plaintiff in terms of any exhibits the
7 Defendant intends to introduce that the Plaintiff is objecting
8 to that you haven't been able to work out?

9 *MR. FEICHT:* Yes, there are several Defendant's
10 exhibits that we intend to use on cross that the Plaintiffs
11 have indicated their objections remain.

12 *THE COURT:* After conferring last night?

13 *MR. FEICHT:* Yes, we exchanged emails.

14 *THE COURT:* What is the list of them? These are
15 Defendant's exhibits.

16 *MR. FEICHT:* Defendant's Exhibit 157, 45 --

17 *MR. BENZION:* I am sorry, Mr. Feicht, are you just
18 listing the exhibits you want to use or the ones that are
19 objected to?

20 *MR. FEICHT:* Used and objected to.

21 157, 45, 225, 140, 216-K, 226, 165, 217-F, 216-F, 53,
22 102, 216-A and 103.

23 *THE COURT:* Did you work out the others?

24 *MR. FEICHT:* Yes, there are several -- that is half of
25 the ones, approximately, that we intend to use. The other ones

1 have been resolved.

2 MR. BENZION: Your Honor, if I may, I have to say I
3 don't believe that that was an exhaustive list of Plaintiff's
4 objections to the Defendant's proposed exhibits for today.

5 THE COURT: I am going to take up these right now.

6 Let's go through them and get a feel for what they
7 are. You are saying none of my rulings have given guidance on
8 the exhibits?

9 MR. FEICHT: We think you have. You ruled on 215 and
10 216-F.

11 THE COURT: 157, quickly tell me, I have it, what it
12 is. It is something by James Tracy. What is it, an article he
13 wrote, a blog?

14 MR. FEICHT: Yes.

15 THE COURT: You want to admit it under 801(d)(2).

16 MR. FEICHT: Correct.

17 MR. BENZION: This is published on somebody else's
18 website and we are okay with them using this writing of James
19 Tracy from his own blog or website, not comments that are
20 included in the exhibit.

21 THE COURT: I see. So, in other words, are there any
22 other comments not made by James Tracy, and can you agree to a
23 redaction of them, and so it is just a statement of Dr. Tracy?

24 MR. FEICHT: I don't believe there are comments on
25 this one, it is just because it is not on his website. It is

1 still an admission.

2 MR. BENZION: Page five --

3 THE COURT: Let me talk. Jim Fetzer, and videos, JFK
4 assassination, are you talking about those kinds of things, and
5 where it says fraud, intentional perversion of truth, is that
6 something written by Dr. Tracy right under the picture? Who
7 knows?

8 MR. LEO: Your Honor, this is somebody else's website.

9 THE COURT: I understand. The statement Dr. Tracy
10 made comes in under 801(d)(2)(3). If there is something else
11 there that he didn't write, there is an argument that it should
12 be redacted. Tell me what is not his. The fact that it is
13 someone's website does not provide a legal objection.

14 It is his statement and the other side can bring it
15 in.

16 MR. BENZION: If they lay a foundation, I agree what
17 he wrote. Everything in the margins, above the title and
18 byline, after the article, all the comments, all of that
19 material is hearsay.

20 THE COURT: Okay. I don't disagree. If you can
21 redact it so it is just his statement, 157 can come in without
22 objection; is that correct?

23 MR. BENZION: The statement after the foundation is
24 laid that is his writing.

25 THE COURT: Statement -- ask again in front of the

1 jury. I am making my notes, without objection if redacted and
2 foundation laid.

3 And then 45 is the next one. 45 is an email from
4 Robert Zoller to James Tracy, and then it is from -- well, it
5 is a whole string.

6 *MR. FEICHT:* His statements would be non-hearsay,
7 statements from Robert Zoller to Plaintiff are relevant. The
8 Plaintiff testified as to the union's advice on his confusion,
9 not admitted for the truth of the matter, but he testified
10 repeatedly about his confusion and opened the door to what the
11 union advised him, and actions and reliance on their advice.

12 *THE COURT:* Let's go through all of them.

13 There is one from David Williams. Are you not seeking
14 to have that one in, at the very bottom?

15 *MR. FEICHT:* That is part of the impact on the
16 listener as well, it was forwarded to Plaintiff to discuss his
17 obligation to follow these policies. He claimed he was
18 confused, I am going to claim he wasn't confused. Everyone
19 told him what to do, including the union and supervisor.

20 *THE COURT:* Response.

21 *MR. LEO:* 45?

22 *THE COURT:* Yes, the statement by Dr. Tracy comes in
23 an email from Tracy to Tracy and Susan Riley and Timothy Lenz,
24 November 9, 2013 --

25 *MR. LEO:* If 45 comes in, we want it in its entirety

1 to come in.

2 *THE COURT:* Is there more to 45?

3 *MR. LEO:* My 45 is two pages. This is something new.

4 *THE COURT:* Yes. I think the Defendant wants the
5 whole thing in. Are you okay with that? No objection to 45.
6 225.

7 *MR. FEICHT:* That will impact several of the later
8 numbers.

9 *MR. LEO:* We are not blanket waiving objections to
10 hearsay.

11 *THE COURT:* Take them one at a time. 225.

12 *MR. FEICHT:* This is --

13 *THE COURT:* I don't have it.

14 *MR. FEICHT:* Your Honor, this is an audio file.

15 Yesterday, you may recall on direct Plaintiff argued that the
16 book Nobody Died at Sandy Hook was not his book, he was not
17 involved in the marketing at all. He claimed he was unaware --
18 somewhat unaware of the contribution to the book and made it
19 sound to the jury they used it almost like without his
20 permission. This is a podcast where he is discussing his
21 contribution to the book.

22 *THE COURT:* It is an audio file on Tracy's podcast
23 talking about the book?

24 *MR. FEICHT:* Talking about the book, and he is
25 marketing it, saying this is a book we put together.

1 *THE COURT:* A conversation with him?

2 *MR. FEICHT:* And one of the editors. That goes to
3 impeachment purposes. Yesterday, he claimed Jim Fetzer used
4 his blog. This shows he had knowledge they were using it and
5 actively marketed it and he had a full understanding.

6 *THE COURT:* I fully understand. I remember the
7 testimony. Clearly his testimony on the podcast would be his
8 statement, that would be 801(d)(2)(D).

9 What is the objection?

10 *MR. LEO:* Plaintiff disagrees with the
11 characterization of his testimony, but there is hearsay in it.

12 *THE COURT:* The person questioning. Anyone but
13 Plaintiff, is that what you are saying?

14 *MR. LEO:* Yes.

15 *THE COURT:* I understand you want to use it for
16 impeachment, and I understand Tracy's statements are
17 801(d)(2)(D). Impeachment does not get around hearsay in terms
18 of the questions or comments by anyone else on the podcast.

19 *MR. FEICHT:* We are not offering the other persons for
20 the truth of the matter asserted, we are offering to introduce
21 it on James Tracy's understanding.

22 *THE COURT:* An instruction to the jury, questions are
23 not being offered for the truth of the matter, only the answers
24 by Professor Tracy.

25 *MR. FEICHT:* Correct, it is a back and forth

1 conversation, not only Professor Tracy asking the questions.

2 MR. CURLEY: Professor Tracy is asking the questions,
3 he is asking the questions.

4 THE COURT: He is asking the questions?

5 MR. CURLEY: He is speaking, there is an introduction,
6 we characterize it as marketing, it is his podcast.

7 THE COURT: Are you able to -- is it manageable to
8 have his statements -- is it a workable situation to blank out
9 Fetzer's statements?

10 MR. FEICHT: No.

11 THE COURT: How extensive is Fetzer? Is it mostly
12 Tracy?

13 MR. FEICHT: Yes.

14 THE COURT: How long is it?

15 MR. CURLEY: It is long. We are going to use about
16 three minutes.

17 THE COURT: Do you know what portion?

18 MR. CURLEY: The end.

19 THE COURT: Can you give it to me?

20 MR. CURLEY: It is something we typed up, it is not an
21 official transcript.

22 THE COURT: Give the Plaintiff the transcript, let me
23 look at the transcript. Let me view it to see that it's
24 nothing so prejudicial.

25 THE ASSISTANT: It is on the thumb drive of the

1 Defendant's exhibits.

2 *THE COURT:* I am looking at it and I don't have 225.

3 *THE ASSISTANT:* If you look down, there is a folder
4 that says 225.

5 *THE COURT:* Yes.

6 *THE ASSISTANT:* Open that folder.

7 *THE COURT:* Which part?

8 *THE ASSISTANT:* Real Politic with Dr. Tracy interview.

9 *THE COURT:* If you can give me the transcript and tell
10 me, more or less -- I'll reserve, but I will say that part that
11 Dr. Tracy is speaking comes in and I just need to look at --
12 did you say it is Fetzer?

13 *MR. FEICHT:* Correct, Jim Fetzer.

14 *THE COURT:* I have a question mark because I want to
15 hear what it is.

16 *MR. BENZION:* Your Honor, may I be heard on that?

17 *THE COURT:* Yes.

18 *MR. BENZION:* My understanding, it is an hour long
19 podcast.

20 *THE COURT:* They are not playing the whole hour.

21 *MR. BENZION:* Most of it is the guests marketing their
22 book as editors and publishers of the book, and additionally,
23 it is going to add confusion to the jury and mislead the jury.
24 It is marketing, puffery. They are offering the statements for
25 the truth, these people are on there marketing this book, not

1 for the effect on Dr. Tracy.

2 *THE COURT:* I will listen to it and look at it.

3 What is handed to me, is this a new exhibit number?

4 *MR. FEICHT:* Call it 225-A, your Honor.

5 *THE COURT:* Okay, hold on, let me get the exhibit
6 list. Is this a transcript of the portion you are seeking to
7 play?

8 *MR. CURLEY:* Yes -- no. That is the entire
9 transcript. Here is our intention, to ease the Court's burden,
10 we'll play about three minutes of it right from the top.

11 *THE COURT:* Take me through, until where it says 256,
12 346. I see numbers on the left-hand side.

13 *MS. GRIFFIN:* Your Honor, at the end of the 256
14 section where Dr. Tracy finishes introducing Mr. Palachek.

15 *THE COURT:* You want to play -- let me take one step
16 at a time.

17 225, so we are going to say 225-A is a -- is an
18 excerpt and -- well, actually we will call it a memorandum.
19 225 itself is the whole tape, but we will call 225-A the
20 written transcript of 225, and we are marking that right now
21 and that is not coming into evidence, of course.

22 And then you are going to be playing -- so you would
23 anticipate playing all the way through the end of 256 at 346?

24 *MS. GRIFFIN:* There is additional information that
25 goes down further through the end of the 542.

1 *THE COURT:* You are playing all the way through 542?

2 *MS. GRIFFIN:* Yes.

3 *THE COURT:* That is what you want to do?

4 *MS. GRIFFIN:* Yes.

5 *THE COURT:* I will look at that and see about that.
6 We have it marked as 225-A, this is a memorandum, the written
7 transcript, and I will make a ruling on that.

8 Let's move on to -- I am working -- for Defendant's
9 exhibit list, am I working off 398, is that the most current
10 exhibit list?

11 *MR. FEICHT:* Yes, your Honor. We can table the next
12 one, 140. We will try to work that one out. 216-K would be
13 the next one. 216-K. 216-K is from Palachek to Tracy.

14 *MR. LEO:* Hearsay, your Honor.

15 *THE COURT:* It would appear to be. What is the
16 argument?

17 *MR. FEICHT:* This is to discuss with the Plaintiff the
18 fact that yesterday he testified that the Nobody Died at Sandy
19 Hook book was marketed on a rush basis and filed not as
20 scholarly work.

21 *THE COURT:* Can't you ask him about that,
22 cross-examine him about that?

23 *MR. CURLEY:* I will use it for impeachment. That is
24 fine.

25 *THE COURT:* He didn't say anything, this is something

1 written to him.

2 MR. CURLEY: This is to him. The question to him is,
3 when did someone start talking to you about the book?

4 THE COURT: Okay. Then we'll say right now it is
5 inadmissible on its own as hearsay, but, again, you will have
6 your conversation and cross-examination, and if there is
7 something you feel calls this into question as an issue for
8 purposes of impeachment, then we will address it at that time.

9 Presumably, if Dr. Tracy says something that is
10 contrary to what is in the document, then Defendant should be
11 able to impeach. But just because it is impeachment doesn't
12 mean it comes in as evidence. You can reference it.

13 226, have you resolved that?

14 MR. FEICHT: Same issue.

15 THE COURT: I will treat it the same way.

16 What about 165?

17 MR. FEICHT: These are statements, all James Tracy.

18 THE COURT: Everything?

19 MR. FEICHT: Yes, the email he forwards.

20 THE COURT: Why should 165 not come in? Are you going
21 to withdraw that, or is there some other objection?

22 MR. LEO: I just pulled it up.

23 THE COURT: Okay. All right. Our jurors are here, we
24 will continue -- I didn't get a final answer.

25 MR. BENZION: Hearsay within the Plaintiff's

1 statements, quoting other individuals, referencing what other
2 people said or other entities said.

3 MR. FEICHT: We are not offering that for the truth of
4 the matter asserted. We are offering this because James Tracy
5 suggested this to other people.

6 MR. BENZION: It is unduly prejudicial, the things he
7 is referencing in what he says. People accuse him of violating
8 legitimate interests of the university, that is going to have
9 an unduly prejudicial effect.

10 THE COURT: The statement is an email to Mr. Stein, I
11 see that. What is attached there, Nobody Died at Sandy Hook,
12 and his name is under it, did he write that?

13 MR. BENZION: I believe he wrote that. Then there are
14 statements within that that are hearsay.

15 The Pozners write, and it is accusing him of violating
16 the interest of the university, which would be unduly
17 prejudicial to the Plaintiff.

18 THE COURT: What else is not his statement? Anything
19 else other than that one?

20 MR. LEO: This is something the Plaintiff copied into
21 an email and sent to this reporter, so there are statements not
22 necessarily written by him, and he forwarded that.

23 THE COURT: We have to see what he says on the stand.
24 I did let the article in the other day. There is a discussion
25 about the Pozners and the whole newspaper article is in

1 evidence, put in by the Plaintiff. I don't know if there is
2 something new in here. If he wrote this, it would come in.

3 Now, if he is within what he is writing quoting what
4 someone else said, the Pozners, right, the handbook states that
5 and goes on, that is arguably something that should be
6 redacted, but I don't know what else is in here that he didn't
7 write.

8 MR. LEO: My understanding is that much of this is
9 written by somebody else and he may have forwarded it to
10 somebody and added a few things to it.

11 He didn't write all of this, most of this was written
12 by somebody else. So he is -- this is not an admission in that
13 he wrote all of this.

14 THE COURT: We will have to get a proffer from Dr.
15 Tracy, so maybe remind the Court.

16 MR. CURLEY: This will be an important document and I
17 remember conversations about letters that people helped him
18 write that he authored, they came in, whether he had help
19 writing it or not --

20 THE COURT: Well, it is help writing versus his
21 writing. Let's table -- this is 165, I am going to reserve on
22 that.

23 I may want to hear Dr. Tracy outside the hearing of
24 the jury on 165 and hear what he has to say about that outside
25 the jury.

1 MR. CURLEY: Before he starts, we might want to do
2 that, it is coming quick.

3 THE COURT: Okay. You have your other witness here.

4 Dr. Tracy, could you take the stand briefly. You
5 remain under oath. If we could have you take the stand, and I
6 will have a very brief questioning from Defense right now, like
7 a couple of minutes. This is not your full questioning, but
8 the foundation issue.

9 They are going to ask you a couple of questions about
10 Defense Exhibit 165, and I want to have that done outside the
11 jury's hearing. There needs to be clarification on what role
12 you played in this exhibit.

13 THE WITNESS: Okay.

14 BY MR. CURLEY:

15 Q. Do you recognize the email?

16 A. This email I sent to Gary Stein who I believe is the
17 associate editor of the opinion page of the Sun Sentinel.

18 Q. This email was in response to the article -- this email was
19 in response to the article written by the Pozners, right?

20 A. What the Pozners wrote accusing me of criminal harassment.

21 Q. Okay. This was the response you sent to the paper that you
22 were hoping they would print, right?

23 A. It was one response, it was not the response that they
24 printed.

25 Q. Okay.

1 A. And I didn't author -- the principal question is, did I
2 author this?

3 Q. No, my question was, did you send this to the paper hoping
4 they would print it, and I think you said yes?

5 A. That's true, yes.

6 Q. All right, sir. Everything in here, this is your email,
7 right? That is you, James Tracy, isn't it?

8 A. Which heading?

9 Q. See the line that says first page, there is a heading that
10 says: Subject, great opinion piece from James Tracy. That is
11 you, right?

12 A. It says guest opinion piece.

13 Q. You are James Tracy, aren't you?

14 A. Yes.

15 Q. Is it Ms. or Mr. Stein that you are writing to at the Sun
16 Sentinel?

17 A. I contacted Mr. Stein by telephone and asked if I could
18 write a response to the Pozners' opinion piece.

19 Q. And this is what you sent Mr. Stein, right?

20 A. This is the first piece I sent Mr. Stein, yes.

21 Q. How many did you send?

22 A. Two.

23 Q. Okay.

24 A. One that I authored and one that someone else authored.

25 Q. Okay.

1 Is there a second page to this? Can we go to the second
2 page, please, so we can see the whole exhibit? Okay.

3 That was all part of your email, right?

4 A. This is not what I wrote. I cut and pasted this.

5 Q. Okay. Do you see at the end -- let's look at the last line
6 there: "Don't take my word for it, just do a search for the
7 title for a free copy of the book," etc. etc.?

8 A. Yes.

9 Q. You are writing the email, you are saying "don't take my
10 word for it." That is you, right?

11 A. Those are not my words.

12 Q. My is not your word? Did you send this email or didn't
13 you?

14 MR. BENZION: Asked and answered.

15 THE COURT: Can I try to understand?

16 BY THE COURT:

17 Q. Dr. Tracy, you wrote an email to G. Stein at the Sun
18 Sentinel, on December 13, 2015?

19 A. I sent an email, yes.

20 Q. Okay, attached below the email to Mr. Stein for a brief
21 conversation, and it goes on. Thank you. Sincerely, James
22 Tracy. Following that it says Nobody Died at Sandy Hook, James
23 Tracy. And then goes to the very end which ends, "from the
24 fake death of their son."

25 That portion, did you write that?

1 A. No. I wrote a small portion of it.

2 Q. Who -- go ahead.

3 A. This is something that was sent to me by Dr. Fetzer. I was
4 distressed because of the Pozners' attack on me in the Sun
5 Sentinel. He said you should respond, respond to it with
6 something like this.

7 Q. You put it with your name and submitted it to the Sun
8 Sentinel as if it were a statement you would like the Sun
9 Sentinel to publish?

10 A. Yes.

11 Q. You adopted the statement?

12 A. Yes.

13 THE COURT: Okay, all right. Any further questions?

14 MR. LEO: Nothing further.

15 MR. BENZION: Further argument.

16 BY MR. BENZION:

17 Q. At the time the email was sent was the book being sold or
18 offered free online?

19 A. It was offered for free online. I believe November 20th is
20 when it was discontinued by Amazon.com.

21 MR. BENZION: So, your Honor, we are very concerned
22 about misleading of the jury with respect to this. You heard
23 argument from counsel he is marketing the book, marketing the
24 sale of the book. This book was not for sale, this is in the
25 statement they seek to get in. We want to the make sure there

1 is no mischaracterization for confusion here.

2 *THE COURT:* That part can be clarified. It seems
3 clear to the Court it is a matter of evidence under the rules
4 of evidence, that it is admissible as a statement made and/or
5 adopted by the Plaintiff offered by the opposing side, so
6 Exhibit 165, over objection, comes in.

7 *MR. BENZION:* What about the hearsay within the
8 statement?

9 *THE COURT:* I can give, the Court, an instruction if
10 you want, as to any particular statements that are quoting
11 someone else, they are not coming in for the truth of the
12 matter. I will remind you to ask the Court to give that
13 instruction and I will do that.

14 We will take up the other ones when we have time. I
15 think you said some of them are resolved because of some other
16 rulings.

17 For now, we will bring our jury in. Dr. Tracy, you
18 can take a seat at counsel table. We are going to have that
19 other witness. Give me one moment, I will come right back, I
20 will bring this in. Just one second.

21 (Pause).

22 *THE COURT:* All right. We can bring our jury in.

23 (Thereupon, the jury returned to the courtroom).

24 *THE COURT:* Okay, welcome back everyone, be seated.
25 Good morning.

1 In the interest of accommodating a particular witness
2 who is only available today, even though normally in the course
3 of the trial I would turn it over to Defense for Defense's
4 cross-examination of Dr. Tracy and any direct examination that
5 the Defense has of Dr. Tracy, given that type of instruction I
6 have given you where the parties are trying to call certain
7 witnesses once if possible, there is a witness to be called out
8 of turn. All the attorneys have been working together to be
9 accommodating in that regard.

10 Dr. Tracy will not be on the stand at this particular
11 moment. Who is the Plaintiff calling?

12 MR. BENZION: We are calling Dr. Stephen Kajiura.

13 THE COURT: Okay, he may come in.

14 STEPHEN KAJIURA, PLAINTIFF'S WITNESS, SWORN

15 THE WITNESS: My name is Steven Kajiura,
16 S-T-E-P-H-E-N, K-A-J-I-U-R-A.

17 THE COURT: Okay. Hold on one moment. Let me get
18 organized here with the paperwork. All right. You may begin.

19 **DIRECT EXAMINATION**

20 BY MR. BENZION:

21 Q. Good morning, Doctor.

22 A. Good morning.

23 Q. How are you today?

24 A. A little nervous.

25 Q. Understood, that is natural.

1 Would you please tell the jury where you work?

2 A. I am an employee at Florida Atlantic University.

3 Q. What is your job?

4 A. I am a professor.

5 Q. Are you a tenured professor?

6 A. Yes.

7 Q. How long have you been a tenured professor?

8 A. I received tenure in 2010.

9 Q. How long have you been a professor?

10 A. I was promoted to a full professor in 2015.

11 Q. What were you before?

12 A. Associate.

13 Q. How long were you an associate?

14 A. 2010 to 2015.

15 Q. Thank you. As a professor, are you a member of the faculty
16 of Florida Atlantic University?

17 A. Yes.

18 Q. Doctor, I am going to ask you questions about discipline
19 you faced at Florida Atlantic University.

20 A. Okay.

21 Q. Were you disciplined by Florida Atlantic University in
22 July 2013?

23 A. Yes.

24 Q. Was that the first time you were disciplined by Florida
25 Atlantic University?

1 A. Yes.

2 THE COURT: Do you mind pulling the microphone closer
3 up to your mouth.

4 THE WITNESS: Okay.

5 BY MR. BENZION:

6 Q. With respect to the discipline in July 2013, was Diane
7 Alperin involved in your discipline at all?

8 A. Diane Alperin was in the Provost Office and I had appealed
9 to them, so she did review it at some level.

10 Q. Do you have any knowledge about Diane Alperin's involvement
11 in discipline other than that?

12 A. I met with her and there was an attorney present as well,
13 whose name escapes me now. Diane Alperin wrote her decision
14 denying my appeal of the grievance.

15 MR. BENZION: I show the witness what is marked as
16 Defendant's 53 for identification purposes.

17 May I approach, your Honor?

18 THE COURT: Yes.

19 BY MR. BENZION:

20 Q. Dr. Kajiura, who are were you disciplined by in 2013, at
21 Florida Atlantic University?

22 A. It says Janet Blanks, B-L-A-N-K-S.

23 Q. And who was Janet Blanks to you at this time, Dr. Kajiura?

24 A. She was the interim Dean of the College of Science. She
25 was my supervisor.

1 Q. Based on the role of the supervisor to the department
2 chair, was this within the dean's duties at Florida Atlantic
3 University to determine whether you should be disciplined or
4 not?

5 A. It is my understanding it went through the dean, yes.

6 Q. And this document in front of you, did Janet Blanks sign
7 this document?

8 A. Yes.

9 Q. And what is this document in front of you?

10 A. This is a notice of proposed discipline.

11 Q. How do you know that is what it is?

12 A. That is what it says, RE: Notice of proposed discipline.

13 MR. BENZION: I would like to move this document into
14 evidence as Plaintiff's 53.

15 THE COURT: Any objection?

16 MS. GRIFFIN: No objection.

17 THE COURT: Okay, 53 is admitted without objection.

18 (Whereupon Plaintiff Exhibit 53 was marked for evidence.)

19 MR. BENZION: May I publish, your Honor?

20 THE COURT: Yes.

21 BY MR. BENZION:

22 Q. Dr. Kajiura, can I refer you, please, to page four of
23 Plaintiff's Exhibit 53, the Notice of Discipline sent to you?

24 A. Okay.

25 Q. Can you please -- I will read this. "Outside employment

1 conflict of interest forms. You have been inconsistent in
2 submitting the outside employment professional activity forms
3 and financial conflict of interest forms."

4 Doctor, prior to being disciplined for inconsistently
5 submitting your outside employment professional activity forms,
6 did you receive training on how to fill out the forms?

7 A. No.

8 Q. Prior to being disciplined for inconsistently submitting
9 outside professional activity forms, did you receive any
10 training for when you should use these forms?

11 A. No.

12 Q. Did you also -- in the first sentence there is reference
13 that you also failed to fill out financial conflict of interest
14 forms. Is that true, Dr. Kajiura?

15 MS. GRIFFIN: Objection, mischaracterizes the
16 sentence.

17 THE COURT: Rephrase.

18 BY MR. BENZION:

19 Q. "You have been inconsistent in -- you have been
20 inconsistent in submitting the outside employment professional
21 activity forms and financial conflict of interest forms."

22 My question is, Dr. Kajiura, is it true you were
23 inconsistent in filling out and submitting financial conflict
24 of interest forms at the time of the Notice of Discipline?

25 A. I think that I submitted them -- there are two things here,

1 outside employment form and conflict of interest form, and my
2 understanding -- my recollection is that every time you submit
3 a grant proposal, you are required to do both of these forms,
4 at least a conflict of interest form, I know for sure.

5 So, I had done that for every grant that I had received, so
6 I -- I'm not sure what the inconsistency was. I think I did it
7 wrong one time, and I think that was probably the root of the
8 problem.

9 Q. Let's go to page seven, please.

10 I am going to read the conclusion. "In conclusion, you
11 violated numerous policies" --

12 *THE COURT:* Slow down.

13 *BY MR. BENZION:*

14 Q. "In conclusion, you violated numerous FAU policies related
15 to risk management and federal guidelines covering research
16 with animals. You had animals die under your care, but delayed
17 reporting those incidents to the IACUC. You have been
18 inconsistent in reporting and completing forms required for
19 outside employment/professional activity."

20 "When you did complete the forms, you did not always
21 include all relevant information. You have not followed risk
22 management policies and put students in harm's way without
23 assessment and permission of the university.

24 "In the future all IACUC policies must be followed
25 precisely, without any breach. You will also follow all

1 university policies related to the health and safety of
2 students and personnel.

3 "You will complete all outside employment and conflict of
4 interest forms with accurate and complete information, and
5 submit those forms annually as required by FAU policy. Failure
6 to adhere to the directives or further incidents of misconduct
7 or unprofessional behavior will result in additional discipline
8 up to and including termination from employment."

9 Doctor, prior to receiving this letter, did you know that
10 inconsistently or incompletely filling out your report of
11 outside employment, professional activity forms, could lead to
12 your termination for employment?

13 A. No, I did not.

14 Q. What was your punishment in the Notice of Discipline, Dr.
15 Kajiura?

16 A. This was a -- it says at the top a five-day suspension
17 without pay, but there were a lot of other things not listed in
18 that title.

19 Q. Other forms of punishment that were not listed in the
20 punishment?

21 A. Yes.

22 Q. How else were you punished?

23 A. They denied a Federally awarded grant to me, shut down my
24 research, which impeded my duty to do the job and impacted the
25 students to complete their graduate education.

1 Q. All the punishments you received, did they remain permanent
2 punishments?

3 A. The five-day suspension was overturned by the arbitrator,
4 stated it was --

5 MS. GRIFFIN: Objection, hearsay.

6 THE COURT: Sustained.

7 MR. BENZION: The result, but not what the arbitrator
8 said.

9 THE COURT: Yes.

10 MR. BENZION: Do you want me to reask the question or
11 is there a portion that comes into evidence? He didn't
12 actually make the hearsay statement.

13 THE COURT: It can stand as to the five-day suspension
14 was overturned by the arbitrator and leave it at that.

15 BY MR. BENZION:

16 Q. Do you know why the five-day suspension was overturned by
17 the arbitrator?

18 A. Yes.

19 Q. And why is that?

20 THE COURT: Well, he can't get into the opinion or
21 outside statement.

22 MR. BENZION: It is his knowledge, he went through the
23 entire incident --

24 THE COURT: If you have personal knowledge, not based
25 on anything you read or a document or a statement out of court,

1 but your own personal knowledge of why it was overturned, you
2 may testify to that.

3 *THE WITNESS:* I'm sorry, your Honor, to clarify, it
4 was the arbitrator's decision letter that was given to me.

5 *THE COURT:* That is how you learned it was overturned?

6 *THE WITNESS:* Yes.

7 *MR. BENZION:* I will stop there.

8 *THE COURT:* Yes, thank you.

9 *THE WITNESS:* FAU has a copy, if you need it, of that
10 decision letter.

11 *BY MR. BENZION:*

12 *Q.* Thank you, Doctor, thank you so much.

13 In addition to your violations -- alleged violations of the
14 outside -- or the outside activities policy, were you
15 disciplined for other alleged violations of university policy
16 in this Notice of Discipline?

17 *A.* Not in this Notice of Discipline, just whatever is written
18 here.

19 *Q.* Okay. So, whatever is in this document is everything you
20 were disciplined for in July 2016?

21 *A.* As I said, there were other ramifications that were not
22 specifically outlined here, but that detrimentally impacted my
23 ability to conduct my research.

24 *MR. BENZION:* Sorry, one moment, your Honor, please.

25 No further questions, your Honor.

1 THE COURT: Okay. Any cross-examination?

2 MS. GRIFFIN: Yes, your Honor.

3 THE COURT: Okay.

4 **CROSS-EXAMINATION**

5 BY MS. GRIFFIN:

6 Q. Good morning, Dr. Kajiura.

7 A. Good morning.

8 Q. I have a few followup questions for you. Dr. Kajiura, you
9 mentioned that you work in the College of Science?

10 A. Yes.

11 Q. At the time the Notice of Discipline was sent to you by
12 interim Dean Blanks? The Court Reporter needs a verbal answer.

13 A. Repeat the question.

14 Q. The Notice of Discipline, it was sent to you by interim
15 Dean Blanks?

16 A. Yes.

17 Q. Dr. Alperin, she didn't sign that Notice of Discipline, did
18 she?

19 A. This is the proposed discipline, this is the proposed
20 discipline signed by Dean Blanks. I am not sure about the
21 dean -- that was someone higher than Dr. Blanks, might have
22 been Dr. Coltman, I don't know.

23 Q. Did you report to Dr. Heather Coltman?

24 A. I don't know that person.

25 Q. You mentioned earlier that there was an issue with one of

1 your grants related to this notice of proposed discipline.

2 A grant is where you get money for research, isn't it?

3 A. Yes, that is correct.

4 Q. Does the division of research have a role in granting
5 awards for grants, to your acknowledge?

6 A. Yes.

7 Q. I believe you testified you submitted report of conflict of
8 interest forms and activity reports?

9 A. Yes.

10 Q. You never refused to submit one of those forms, did you?

11 A. No.

12 Q. You signed your annual assignments each year, Dr. Kajiura?

13 A. Yes.

14 Q. You have never refused to submit your annual assignment,
15 have you?

16 A. That is correct.

17 Q. Have you ever refused to follow any direct order from your
18 supervisor, Dr. Kajiura?

19 A. No.

20 MS. GRIFFIN: No further questions.

21 MR. BENZION: Brief redirect.

22 THE COURT: Okay, redirect.

23 **REDIRECT EXAMINATION**

24 BY MR. BENZION:

25 Q. What college are you in?

1 A. Charles E. Smith College of Science.

2 Q. Does your college have -- is your college governed by
3 different rules than other colleges at Florida Atlantic
4 University?

5 A. No.

6 MS. GRIFFIN: Objection, your Honor, outside the
7 scope.

8 THE COURT: Overruled. You did get into what college
9 the professor works in. I will allow it.

10 THE WITNESS: To the best of my knowledge, all the
11 colleges are governed the same.

12 BY MR. BENZION:

13 Q. Are the deans at your college governed by different rules
14 than the deans at other colleges at Florida Atlantic
15 University?

16 A. No. To the best of my knowledge, they are governed all the
17 same.

18 Q. When you received this Notice of Discipline -- can you
19 scroll down to four, please -- keep going, five. Thank you so
20 much. More, please. Thank you.

21 When you received this Notice of Discipline, looking at
22 this page here, Doctor, were you able to discern what
23 information was missing from your report of outside employment
24 professional activity forms alleged by the university?

25 MS. GRIFFIN: Objection, outside the scope.

1 MR. BENZION: Your Honor, they asked if he refused,
2 and in this case the Plaintiff is arguing that he was confused
3 and not refusing, and the reason is because --

4 THE COURT: No speaking objection.

5 There was a question relating to whether the witness
6 ever refused to do something. Are you saying this line of
7 questioning goes to that issue?

8 MR. BENZION: Absolutely.

9 THE COURT: Okay, overruled. You may stick to that
10 issue.

11 What is the question?

12 BY MR. BENZION:

13 Q. When you received this Notice of Discipline, were you able
14 to have an understanding of the information that was missing
15 from your report of outside professional activity forms that
16 the university alleged you failed to put on those forms?

17 A. Could you repeat that one more time.

18 Q. After reading this Notice of Discipline, were you able to
19 understand what the university wanted on your reported activity
20 forms?

21 A. No. From my reading of the form and from the arbitrator's
22 decision, what I interpreted as correct was not the way the
23 university wanted it to be interpreted.

24 Q. A moment ago you mentioned that this wasn't the actual
25 Notice of Discipline -- the actual discipline you received,

1 this was just a Notice of Discipline. Do you remember saying
2 that?

3 A. Yes, this is a proposed discipline.

4 Q. So, was there a discipline letter that came after this
5 affirming the discipline of the proposed discipline?

6 A. I honestly don't remember exactly what happened, if there
7 was a specific memo that said that or whether they enacted this
8 proposed one. I'm sorry, I don't remember exactly.

9 Q. That is okay.

10 MR. BENZION: No further questions, your Honor.

11 THE COURT: Okay.

12 MR. CURLEY: Your Honor, we have a couple of followups
13 on that.

14 THE COURT: Well, what is the basis? Are you claiming
15 new areas were opened up?

16 MR. CURLEY: Yes.

17 THE COURT: What is the limited area?

18 MR. CURLEY: The question is, did he file a grievance.

19 THE COURT: That is the question you want to ask?

20 MR. CURLEY: Yup.

21 MR. BENZION: If that is the question, I need to ask
22 one followup question after that.

23 THE COURT: You have one question.

24 MR. CURLEY: That is okay.

25 THE COURT: If you want, you can ask it. I will ask

1 the other side to responded with a question.

2 MR. CURLEY: I will withdraw the question.

3 THE COURT: All right. Thank you so much, that is
4 your testimony.

5 THE WITNESS: Thank you.

6 THE COURT: You may be excused.

7 At this time, we will have Dr. Tracy come back on the
8 stand.

9 So you may come back on the stand, Dr. Tracy, and you
10 remain under oath, and Defense will begin your
11 cross-examination. And simply notify the Court when your
12 cross-examination has ended and your direct examination begins,
13 if there is going to be any direct examination following your
14 cross-examination.

15 MR. CURLEY: Let me put these up here.

16 THE COURT: Counsel, does counsel need a ruling on 225
17 at this juncture?

18 MR. CURLEY: Yes.

19 THE COURT: Can you come sidebar.

20 MR. CURLEY: Yes.

21 (Proceedings at sidebar.)

22 THE COURT: Okay, 225 is the podcast and 225-A is the
23 memo given to me with the transcript. The ruling is as
24 follows:

25 The Court has reviewed the audio recording, Exhibit

1 225. The Court agrees with the Defendant that the audio of the
2 Plaintiff is relevant insofar as the evidence could reasonably
3 be viewed by the jury as evidence that Plaintiff marketed the
4 book Nobody Died at Sandy Hook. Upon review of the statements
5 by non-parties, however, the editors of that book, the Court is
6 going to exclude that evidence. That evidence could be too
7 unfairly prejudicial because the audio of the editors talks
8 about one of the editors spending time in federal prison and
9 the association that one of the editors has with the Democratic
10 party.

11 Therefore, the Court will permit the Defendant to play
12 the following excerpts: 000 to 1:34, and 2:06 to 2:20, 2:36 to
13 3:45, and 5:02 to 5:34. I think I meant to say semicolon.

14 The Court will not permit the following excerpts to be
15 played: 1:35 to 2:05.

16 *MR. CURLEY:* Is that the other side speaking?

17 *THE COURT:* I have to look at it. 2:21 to 2:35, and
18 3:46 to 5:01.

19 Nothing after 5:34 should be played with these
20 excerpts. The Court has edited out one of the Plaintiff's own
21 statements because it references the prison term of one of
22 the --

23 *MR. BENZION:* Your Honor, the first number you read
24 was 0021 --

25 *THE COURT:* 002 -- it looks like this, to 134.

1 *MS. GRIFFIN:* The beginning through 134, your Honor?

2 *THE COURT:* Yes.

3 *MR. CURLEY:* Thank you.

4 *THE COURT:* Okay.

5 (Sidebar concluded.)

6 *THE COURT:* Okay, you can begin cross-examination.

7 **CROSS-EXAMINATION**

8 *BY MR. CURLEY:*

9 *Q.* Your Honor, thank you, good morning.

10 Good morning, Professor Tracy.

11 *A.* Good morning, Mr. Curley.

12 *Q.* Why don't we get a few things right out there and we can
13 perhaps move on to contested matters.

14 Is it true that you never told the school that you were
15 taking money through your blog?

16 *A.* In what form? Are you talking about contributions?

17 *Q.* In any form of currency, cash, PayPal, any kind of money
18 you can think of.

19 *A.* At the time it never occurred to me to do so.

20 *Q.* Okay. So the answer is you never did, right?

21 *A.* At which time?

22 *Q.* When you worked for FAU up until the time of your last day.

23 *A.* I did not.

24 *Q.* Okay. Did you ever tell the school you were receiving
25 money to support your research through your blog?

1 A. I was not performing academic research through my blog.

2 Q. That is not my question. My question is, did you tell the
3 school that you were -- let's put it this way, that you were
4 asking for money to help support research on your blog?

5 A. I was not doing research on my blog.

6 Q. So the answer would be no, you didn't, right?

7 A. I can only state that I was not doing academic research on
8 my blog. I made that clear during the testimony earlier.

9 Q. That you did.

10 You were doing research through your blog, right?

11 A. No.

12 Q. So, if there is a button on your blog that says donate here
13 for research, what was that about?

14 A. I think when you click through to PayPal it says memoryhole
15 blog research fund, yes.

16 Q. Explain to the jury what that is.

17 A. Well, there is a difference, as I attempted to explain,
18 between pedestrian research of a citizen journalist through
19 academic research which I do for FAU.

20 Q. It is still money, though, right?

21 A. A paltry sum to maintain the website. I had a readership
22 and a handful of these individuals contributed that way, and in
23 that fashion, we were able to maintain the website as far as
24 paying for web space and so forth, a small amount.

25 Q. A paltry sum?

1 A. Yes.

2 Q. What is paltry to you? How much did you get?

3 A. Over the course of around two years, I believe a total of
4 around \$2,500 was accumulated. About two-thirds,
5 three-quarters of that was after I was terminated by followers
6 of the blog that wanted to support some sort of legal action or
7 the equivalent. So most of the money -- if I may finish my
8 answer.

9 Q. Sure.

10 A. Most of the money I think amounted to around a thousand
11 dollars.

12 Q. A thousand dollars --

13 A. Over the course of two years, which would be less than \$50
14 a month, 30, 40, \$50 a month, somewhere along those lines.
15 This was kept in reserve in case the blog had to be moved, went
16 down or additional equipment I had to purchase to keep the blog
17 itself, upkeep.

18 Q. And I want to be clear --

19 A. And also --

20 *THE COURT:* Wait a minute, we can't have talking over
21 each other. We have to allow the question to be fully asked,
22 pause, and fully answered, pause, and a new question.

23 State the question again.

24 *MR. CURLEY:* Okay, thank you, your Honor.

25

1 BY MR. CURLEY:

2 Q. You said something about two years before you were
3 terminated. So, you were receiving money through your blog for
4 two years?

5 A. I have to look at the documentation, I believe from 2014.
6 It is fairly common for bloggers to have a small donate or tip
7 jar button on their site to collect small amounts to maintain
8 the website. It is certainly nothing I was going to pay bills
9 with, and I had no intention to do so. It was kept in an
10 isolated fashion for maintenance of the blog itself.

11 Q. When the school asked you to disclose compensation for
12 research, or research, you decided that was not to you?

13 A. This was not salary or compensation that I was using
14 personally to pay my bills with or enriching myself with, so I
15 didn't recognize it as such.

16 Q. It was your blog, right, memoryhole?

17 A. I think that is established.

18 Q. So the answer is yes?

19 A. Yes.

20 Q. Your blog.

21 So, if people don't give you money to pay for your research
22 and maintaining the blog, whatever it is you were using the
23 money for, you would have to pay it, right?

24 A. Rephrase the question.

25 Q. You were going to have to maintain the entire blog --

1 A. Rephrase the entire question.

2 Q. Okay. People give you money, right? Let's go slow.

3 A. Yes.

4 Q. It is your blog, right?

5 A. They put money into the account for the site, yes.

6 Q. You own the blog, you run the blog, right?

7 A. I run the blog. Legally, I am not sure, automatic
8 overseers -- wordpress.com owns the site the blog is housed on,
9 but I have access to and manage the blog.

10 THE COURT: Can Defense remind me what Docket Entry is
11 your most current list, so I am working off the right one?
12 398?

13 MR. FEICHT: Correct.

14 THE COURT: Okay. Which exhibit did you refer to?

15 MR. CURLEY: 21, your Honor, Defendant's 21.

16 THE COURT: Okay.

17 MR. CURLEY: May I approach?

18 THE COURT: Yes.

19 MR. CURLEY: Thank you, your Honor.

20 THE COURT: What did you say the exhibit number was?

21 MR. CURLEY: This is Defendant's Exhibit 21.

22 THE COURT: Okay.

23 BY MR. CURLEY:

24 Q. Professor, I hand you what looks like a copy of the
25 memoryhole blog site. Do you recognize that?

1 A. Yes.

2 Q. There is a donate button on there, isn't there?

3 A. On what page?

4 Q. Second page. Memoryhole Research Fund, that is the title
5 on it?

6 A. Okay, yes.

7 Q. So, if I am looking at the blog, and I see that donate
8 button, it has a bunch of credit card signs underneath it,
9 right?

10 A. That is the standard PayPal chip, yes.

11 Q. I count six different credit cards that they accept for
12 you; is that right?

13 A. I guess so, right. Yes, I think PayPal has a number of
14 them.

15 Q. Okay. So if I click that donate button on there, would you
16 agree -- at least it looks to me like it is going to go to the
17 Memoryhole Research Fund. Does that sound right?

18 A. Looks like it, yes.

19 Q. You designed this, this is your site?

20 A. Yes.

21 Q. When you wrote Memoryhole Research Fund and put donate and
22 credit cards, you wanted them to contribute to the site?

23 A. I didn't put credit cards on the site, this is a standard
24 button for PayPal, this is something generated by their
25 company. They have credit cards and so forth on there, but

1 that illustrates the ways in which one can send remittances.

2 Q. Remittances, that is cash, money?

3 A. Yes.

4 Q. Okay.

5 MR. CURLEY: Your Honor, at this time I move to admit
6 Exhibit 21 in evidence.

7 MR. LEO: No objection, your Honor.

8 THE COURT: 21 is admitted without objection.

9 (Whereupon Defense Exhibit 21 was marked for evidence.)

10 BY MR. CURLEY

11 Q. Go to page two so the jury can see the picture of Professor
12 Tracy with the Memoryhole Research Fund next to it.

13 This is a typical example of your memoryhole blog page at
14 the time?

15 A. If one scrolls down, yes. If one would go to the website,
16 they'd see more or less what is on the first page of this
17 document.

18 Q. Okay.

19 A. The donate button is not on the top of the page, I believe
20 it is halfway down.

21 Q. On the second page next to your photo, right?

22 A. Well, this is something else that would be helpful, if the
23 jury understands that this is a rolling series of articles. I
24 typically don't have a photo of myself on the website.

25 MR. CURLEY: May I approach, your Honor?

1 THE COURT: Yes. If there is an exhibit, let opposing
2 side know what it is and make sure they have it.

3 MR. CURLEY: I have and I will, your Honor.

4 THE COURT: Okay.

5 MR. CURLEY: This is Exhibit 216, small letter i, a
6 PayPal --

7 BY MR. CURLEY

8 Q. All right. Professor Tracy, I handed you what is marked
9 216, small letter i.

10 Are those the PayPal records?

11 A. I don't know if this is a complete set of records, but
12 these are some of them, yes.

13 Q. All right.

14 MR. CURLEY: I move to admit 216-i into evidence.

15 THE COURT: Any objection?

16 MR. LEO: No.

17 THE COURT: 216-i is admitted without objection.

18 (Whereupon Defense Exhibit 216-i was marked for evidence.)

19 BY MR. CURLEY:

20 Q. Let's look at page number one real quick. They are
21 similar, aren't they?

22 A. This is the largest amount that was ever received and
23 dwarfs most of the other contributions, and it is on page one.

24 Q. Okay. Is it inaccurate?

25 A. These are out of order. This is March 1st of 2014, and the

1 second page is February 8th of 2014, the third page,
2 February 22, fourth page, February 23. It looks like someone
3 who prepared this exhibit took this page and put it on page one
4 of the exhibit.

5 Q. Do you think we conspired to make you look bad?

6 MR. LEO: Objection, argumentative.

7 THE COURT: Sustained.

8 THE WITNESS: I don't know, Mr. Curley.

9 BY MR. CURLEY:

10 Q. If it makes it easier for you, let's do page number two,
11 okay. Put that up.

12 The question I was going to ask you, it looks like when
13 somebody donates money, this is \$20, if it is only 20 does that
14 mean you don't have to disclose anything?

15 A. To whom?

16 Q. To the school.

17 A. This is my personal website.

18 Q. Okay. So, because you call it your personal website, that
19 means none of the school rules apply; is that right?

20 A. It did not occur to me that these remittances were
21 reportable.

22 Q. So the amount -- does the amount matter? That is all I am
23 getting at now. If it is small, does that change any of the
24 rules or that is not the issue, is it?

25 A. It shouldn't if the rules are clearly expressed, if the

1 rules are clearly stated.

2 Q. Okay. We can agree the amount doesn't matter, or do we
3 want to quibble about that?

4 A. I don't think the amount would matter. Once again, if the
5 rules were clearly stated, it wouldn't matter if it were a
6 dollar or \$200, one has to follow the rules.

7 Q. We can agree on that?

8 A. Yes.

9 Q. Let's look at the \$20 one, and it looks like the purpose --
10 I am reading the purpose here, Memoryhole Independent Research
11 Fund. Am I reading that correctly?

12 A. Yes.

13 Q. So, this person -- it looks like Dana Kendall, they donated
14 and their money went toward an independent research fund for
15 memoryhole; is that right? That is what they thought?

16 A. Independent research fund, yes. This is something I
17 thought of at the spur of the moment when I wanted to give the
18 fund a title.

19 Q. Okay. I apologize, your Honor, one second.

20 I want to try to use the exhibits that are already in, if I
21 can.

22 Okay, yesterday we heard a lot of testimony about
23 assignment sheets that you signed, right?

24 Let's pull up 32-E-1.

25 *THE COURT:* Is this Plaintiff or Defendant?

1 MR. CURLEY: This is in evidence as a Plaintiff's
2 exhibit.

3 THE COURT: I can work off the Defense's. Are you
4 going to want them in as Defense exhibits?

5 MR. CURLEY: I will try to work off what is already
6 in.

7 THE COURT: All right. Let us know which one you want
8 off the Plaintiff's.

9 MR. CURLEY: This is 32-E-1, the assignment sheet.

10 THE COURT: Okay. 32-E-1 is in evidence, yes.

11 We will use Defendant's exhibits if it is easier, I
12 was going to try to cross reference them.

13 You are going to use Defense or Plaintiff's?

14 MR. CURLEY: We will use theirs for the moment, but
15 we'll switch over.

16 THE COURT: All right.

17 BY MR. CURLEY:

18 Q. All right. Professor Tracy, I could work off memory here.

19 I handed you -- can you find it, 32-E-1?

20 MR. MEDGEBOW: I don't have it separated.

21 BY MR. CURLEY:

22 Q. That is the assignment sheet you signed; is that right?

23 A. Yes.

24 Q. That doesn't have anything on there about whether you are
25 being compensated for research, does it?

1 A. No.

2 Q. It doesn't have anything about receiving money, does it?

3 A. No.

4 Q. It doesn't have anything about using school property
5 personally, does it?

6 A. It does not.

7 Q. But you were all too willing to sign that and turn it in,
8 right?

9 A. I had never been apprised of the policy.

10 MR. CURLEY: Could I get that from you? Would you
11 pass it around to the jury, please. It is in evidence.

12 Is it all right if I publish this to the jury?

13 THE COURT: 32-E-1?

14 MR. CURLEY: Yes. I would like the bailiff to hand it
15 to the jury. They found it on the screen, thank you.

16 THE COURT: Okay, thank you.

17 BY MR. CURLEY:

18 Q. This is your annual assignment, right?

19 A. Yes.

20 Q. We talked about this already. There is nothing in here
21 about whether you are getting money for research or using
22 school property, right?

23 MR. LEO: Objection, asked and answered.

24 THE COURT: Overruled.

25 THE WITNESS: Correct.

1 MR. CURLEY: All right. Let's go to number 81,
2 please, Defendant's 81 in evidence, it is Plaintiff's 60.

3 THE COURT: So, Defendants -- I have to ask you, are
4 you seeking to move it in as a Defense exhibit or not? It is
5 up to you. I need to know whether it is coming in or not.

6 MR. CURLEY: Sure, we will make it easier that way.

7 THE COURT: Defense 81, it is already in evidence, I
8 assume there is no objection.

9 MR. LEO: No objection.

10 THE COURT: Admitted without objection.

11 (Whereupon Defense Exhibit 81 was marked for evidence.)

12 MR. CURLEY: I apologize for the redundancy.

13 BY MR. CURLEY:

14 Q. This is the box you didn't want to check, right?

15 A. It is not as if I didn't want to check it, I was requesting
16 clarification.

17 Q. Put it this way, did you want to check it?

18 A. Not without further clarification from management.

19 Q. Okay. And --

20 A. Because of my special situation.

21 Q. I see. And -- okay. You see in here it says compensated
22 or uncompensated outside activities, right?

23 A. Right after any outside activity, yes.

24 Q. So, this is -- this certainly talks about receiving money,
25 right?

1 A. It depends on the source of the funds. You are well aware
2 this is elaborated in Florida Statute Chapter 112, part III.
3 You are aware of that as an employment attorney.

4 Q. Oh, are you a lawyer, too, sir?

5 A. I am not.

6 Q. Did you go to law school?

7 A. No.

8 Q. Did you want to be a lawyer?

9 A. A lay person can read the laws as well.

10 Q. Did you want to be a lawyer?

11 MR. LEO: Objection, relevance.

12 THE COURT: Sustained.

13 BY MR. CURLEY:

14 Q. Okay, how about we stick with the documents, and we will
15 see what we can do there. Okay?

16 A. Yes, sir.

17 Q. All right. So, the box, you resisted checking it, how does
18 that sound? Can you live with that?

19 A. No.

20 Q. Okay. Let's look at exhibit -- Plaintiff's Exhibit 15,
21 which is the outside activities form.

22 MR. CURLEY: Do you know what number that is? 142.
23 Defendant's 142, I ask to admit it into evidence.

24 THE COURT: Okay. Defense 142, any objection?

25 MR. LEO: I believe it is Exhibit 15 already in, no

1 objection.

2 *THE COURT:* Okay, admitted without objection.

3 (Whereupon Defense Exhibit 142 was marked for evidence.)

4 *BY MR. CURLEY:*

5 Q. This is the report of activities box or form, right?

6 A. Yes.

7 *MR. LEO:* Objection, mischaracterization of the
8 document.

9 *THE COURT:* Well, it is up on the screen for
10 everybody. I will overrule. Everybody can see what it is.

11 *BY MR. CURLEY:*

12 Q. Your counsel has an issue -- do you see it says proposed
13 employment/activity right in the middle of the form?

14 A. Yes.

15 Q. When you see employment/activity, do you understand that
16 ought to cover things that include activities and employment?

17 A. I don't know, these things need to be clearly defined.

18 Q. Tell me about your education. How long did you go to
19 school?

20 A. Graduate or undergraduate?

21 Q. Let's hear it all.

22 A. Undergraduate, the typical four years or the equivalent,
23 although I think there was more because I transferred from one
24 undergraduate institution to another, and graduate school, six
25 years.

1 Q. You are an educated man, right? We can agree on that?

2 A. As all of the faculty at Florida Atlantic, yes.

3 Q. Media studies is your forte?

4 A. Journalism, history, yes.

5 Q. You are pretty good with the English language, you
6 understand it?

7 A. Yes.

8 Q. Okay. So, in the form -- can you take that down, please.

9 In the form where it asks about other compensated activity,
10 that box, you saw that, right?

11 A. Yes.

12 Q. You never checked it, did you?

13 A. This is what I was -- I had questions about, and I was
14 attempting to speak to my supervisors on.

15 Q. Okay. So the answer to my question is?

16 A. The understanding among the faculty -- I am sorry, Mr.
17 Curley. The understanding of the faculty is that if there is
18 outside employment, outside income, I don't consider small
19 donations, a blog, to be income of any sort.

20 Q. Okay, let's talk about that for a minute. You don't
21 consider it to be income of any sort. Who did you tell at FAU
22 that you were receiving this money, but you are not going to
23 put it on the forms? Who did you tell?

24 A. It did not occur to me receiving \$30 a month or perhaps \$40
25 a month was necessary to put on a form and no one elaborated

1 this to me either. Had they done so, I would certainly have
2 complied, and if the policy were administered evenly, I would
3 have complied. I had conversations with other faculty members
4 on occasions and they expressed equal confusion concerning the
5 policy and form.

6 Q. Did they know you were getting money?

7 A. I don't know.

8 Q. You didn't tell them either?

9 A. It is not something I went around and bolstered about. No.

10 Q. We saw a lot of letters and emails, there is a pile of them
11 on the table over there. In any of those does it say, I was
12 receiving money?

13 A. Which -- I would have to go through all of those emails to
14 be able to accurately answer. I am not sure what you are
15 referring to. From the testimony yesterday?

16 Q. You see -- that is all the evidence that you offered
17 yesterday.

18 A. I can tell you I did have an exchange with other faculty by
19 email in September of 2015 --

20 Q. Oh?

21 A. -- concerning the outside employment activity policy. I
22 don't know if that has come into evidence, or we discussed it
23 under the rules.

24 Q. That really wasn't -- outside activities, we know you
25 talked about that, and we know you were reluctant to fill out

1 the form. My question --

2 MR. LEO: Objection, counsel is testifying.

3 THE COURT: Sustained.

4 BY MR. CURLEY

5 Q. My question is and was, in any of the documents where you
6 tell people you are getting money, any of them?

7 A. No.

8 Q. Okay.

9 MR. CURLEY: May I approach, your Honor? This is
10 Exhibit 22.

11 THE COURT: Defense?

12 MR. CURLEY: Yes.

13 THE COURT: Okay.

14 BY MR. CURLEY:

15 Q. Do you recognize 22, Professor Tracy?

16 A. It was the email I just referenced, I believe.

17 Q. Yes, I thought so.

18 MR. CURLEY: I would move this into evidence, your
19 Honor.

20 THE COURT: Any objection?

21 MR. LEO: One moment, your Honor.

22 No objection.

23 THE COURT: All right. Defense Exhibit 22 is admitted
24 without objection.

25 (Whereupon Defense Exhibit 22 was marked for evidence.)

1 MR. CURLEY: Thank you, your Honor.

2 BY MR. CURLEY:

3 Q. I would like you to look at the second to the last
4 paragraph on the first page, and there is a line that begins,
5 "Since money" --

6 A. I'm sorry, this is not the email I was previously
7 referencing. Excuse me.

8 Q. Well, this is the one I was talking about. It says, "Since
9 money would be passing hands, this surely -- since money would
10 be passing hands, this surely would make filing such a form
11 appropriate."

12 Your words, right?

13 A. It is taken out of context, but those are my words.

14 Q. The context is all here. You wrote this, didn't you?

15 A. Context is everything.

16 Q. Okay. You did write that, though, right?

17 A. Yes.

18 Q. When money came in to your blog, is that not changing
19 hands?

20 A. It came in to the blog's account, the blog's fund, it was
21 not something I was using for my own personal expenses. I was
22 careful to keep that isolated for use for the blog if
23 necessary.

24 Q. You kept it very isolated, you didn't tell anybody about
25 it, right?

1 A. Once again, it is not anything that was on the top of my
2 agenda to discuss. This was a small amount that came into the
3 website.

4 Q. We have a lot of discussion here about your issues with
5 clarification and what you need to know, and you are confused.
6 Are you telling me it didn't occur to you to say something
7 about the money that was coming into your site?

8 A. At the time?

9 Q. Yes.

10 A. What time, 2015?

11 Q. Well, it started coming in 2014, but 2015 is when it came
12 to a head, right?

13 A. It did not really occur to me, no.

14 Q. Did you tell the school that you weren't ever using any
15 school property?

16 A. I don't recall.

17 Q. Did you say that what you were doing on your blog was
18 personal, didn't involve the school at all?

19 A. Yes.

20 Q. So, when you are using the school computers and things to
21 do your -- what was it called, Real Politic?

22 A. The podcast?

23 Q. Yes.

24 A. Yes.

25 Q. So, you are using the computers at school and I think you

1 did some of the programs from the school, right, the
2 interviews?

3 A. Sometimes, yes.

4 Q. Yes. So, when you are doing the programs and using the
5 computer, isn't that using the school property?

6 A. Yes.

7 Q. And so, when you say to the folks at the school this is
8 personal, doesn't involve the school at all, when you are
9 taping the show from the school and using their stuff to do it,
10 doesn't that involve the school?

11 A. It is regarded as being incidental use.

12 Q. Oh, okay. So that is your determination, you said I
13 determine this to be incidental so --

14 A. It is from the school's guidelines.

15 Q. I see. There is a form, we saw it yesterday. I will find
16 it on a break. There is a form we saw yesterday that says if
17 you use school property you have to ask for permission, right?

18 A. Yes.

19 Q. You didn't do that, did you?

20 A. I did, and the following day I was fired.

21 Q. Oh. So, hadn't you been using the stuff for years?

22 A. I attempted to comply on December 15, and we looked at the
23 email from Dean Coltman and so forth. And I believe perhaps
24 that is the attachment to that email.

25 Q. Back in -- let's kind of put things in order if we can.

1 We'll catch up in a minute, but yesterday we looked at
2 Plaintiff's Exhibit 6?

3 MR. CURLEY: If I could approach, your Honor?

4 THE COURT: Yes.

5 MR. CURLEY: It is Defendant's Exhibit 16 which we
6 will move into evidence.

7 THE COURT: Defendant's which one? Did you say 16?

8 MR. CURLEY: Yes, your Honor.

9 THE COURT: Okay. No objection?

10 MR. LEO: No objection.

11 THE COURT: Defendant's 16 is admitted without
12 objection.

13 *(Whereupon Defense Exhibit 16 was marked for evidence.)*

14 BY MR. CURLEY:

15 Q. This is the letter where you said what you are doing has
16 nothing to do with FAU, right? Let's go --

17 MR. LEO: Objection, best evidence.

18 MR. CURLEY: I will be happy to show you the line.

19 BY MR. CURLEY:

20 Q. Three lines down, it talks about off campus -- isn't that
21 what you said, off campus unrelated to FAU?

22 A. Yes.

23 Q. Did I take that out of context?

24 A. Technically, yes. I don't think it is relevant in this
25 instance.

1 Q. It is irrelevant, that is your determination? Is that why
2 you didn't tell them?

3 A. No.

4 Q. Okay. So, you told them unrelated not using school, but
5 the truth of the matter is, you are doing the Real Politic
6 podcast at school using their equipment?

7 A. This was over one year later, this is a year and a half
8 after this letter was written.

9 My understanding was, because there were no forms requested
10 or anything of the like, that there was not a problem
11 concerning the podcast specifically, and I was very careful not
12 to use any school resources for the blog itself.

13 Q. So, it was a couple of years ago, so it didn't matter; is
14 that what you are telling the jury?

15 A. Well, I understood --

16 MR. BENZION: Objection, vague. What didn't matter?

17 MR. CURLEY: Use of the school. Okay, sorry, your
18 Honor, that is okay. Why don't we look at -- what is the
19 number, 26?

20 Let's look at 26 in evidence. 26 is the Defense
21 exhibit. Your Honor, I would be much more efficient than this,
22 we took people out of order.

23 THE COURT: With respect to your presentation?

24 MR. CURLEY: The whole presentation.

25 THE COURT: Yes, Dr. Tracey was supposed to be called

1 by the Plaintiff and Defense. In the interest of trying to be
2 efficient with the use of time and mindful of your time, the
3 attorneys have agreed that he would be called just once.

4 However, if there is a limited purpose through which he needs
5 to be called a second time in the Defense case, we haven't
6 gotten to the Defense case yet, that might be possible.

7 That is why we are back and forth on the exhibits.
8 Many of the exhibits are on the Plaintiff's list and the
9 Defense list, but different numbers. That is no fault of
10 anyone, it is the way exhibit lists are put together.

11 MR. CURLEY: Thank you, your Honor. I will try to be
12 respectful of the time.

13 BY MR. CURLEY:

14 Q. You have 36 in front of you, right? 33, I am sorry.

15 A. Plaintiff's 36.

16 Q. That is the letter you wrote on November 22, 2015, right?

17 A. Yes, with a redacted portion on page three.

18 Q. Thank you. That is the letter you wrote, right?

19 A. Yes. Part of it is redacted, but otherwise, yes.

20 Q. In that letter, correct me if I am wrong, didn't you quote
21 your earlier statement about not using FAU property? I think
22 you attached it, didn't you?

23 A. I believe so. It was an attachment, yes.

24 Q. Here we are, 2015, and you are still telling them -- this
25 is a letter to Dean Coltman, and you are telling her that this

1 doesn't concern you, off campus, not FAU property?

2 MR. BENZION: Objection, mischaracterization.

3 THE WITNESS: I didn't --

4 THE COURT: Just a moment.

5 I have to pull the exhibit up unless you want to
6 restate the question.

7 MR. CURLEY: I don't.

8 THE COURT: What is the exhibit?

9 MR. BENZION: Plaintiff's 36, Defendant's 26.

10 MR. CURLEY: I would move 26 into evidence,
11 Defendant's.

12 THE COURT: No objection?

13 MR. BENZION: No, your Honor.

14 THE COURT: Okay, 26 from Defense is admitted without
15 objection.

16 (Whereupon Defense Exhibit 26 was marked for evidence.)

17 BY MR. CURLEY:

18 Q. You are sending this letter to Dean Coltman?

19 A. Yes.

20 Q. You are referencing the conversations you had with them in
21 January?

22 A. That is true, on page two.

23 Q. Yes, and there is your letter I just showed you. If you
24 could bring up the attachment, February 2nd letter, page 22, I
25 think, of 47.

1 There it is, right, same letter?

2 A. This is an excerpt of that letter. I was seeking to
3 provide context of the entire situation.

4 Q. That is the same one that says off campus unrelated to FAU,
5 isn't it?

6 A. That is the attachment, yes.

7 Q. Attachments don't count?

8 A. No. They do.

9 Q. That wasn't true, was it?

10 MR. BENZION: Objection, mischaracterization.

11 THE COURT: Overruled.

12 THE WITNESS: In what respect?

13 BY MR. CURLEY:

14 Q. You are doing your podcast on campus using their equipment?

15 A. Sometimes I was, yes.

16 Q. When you say off campus unrelated to FAU, how do you square
17 that?

18 A. I understood the podcast being an augmentation of certain
19 activities. I was interviewing authors, doctors, attorneys,
20 artists. It was something that I thought to be an enriching
21 thing, an extension in that regard, a variety of personalities.

22 Q. So, was it an inside -- you are saying this is an inside
23 activity, this is something you were doing as part of your job.
24 Is that what you are saying?

25 A. Not exactly.

1 Q. Okay. Augmentation, that is the word you used?

2 A. Yes.

3 Q. Okay. All right.

4 A. Someone who teaches journalism.

5 MR. CURLEY: May I approach, your Honor?

6 THE COURT: Yes.

7 MR. CURLEY: This is already in evidence as
8 Plaintiff's 1. I move Defendant's Exhibit 15 into evidence.

9 THE COURT: Any objection?

10 MR. BENZION: No, your Honor.

11 THE COURT: Defense Exhibit 15 admitted without
12 objection.

13 (Whereupon Defense Exhibit 15 was marked for
14 evidence.)

15 BY MR. CURLEY:

16 Q. Do you remember this letter? We talked about this a lot
17 yesterday.

18 A. Yes.

19 Q. You got this on or about January 28; is that right?

20 A. I believe it was January 30, I think this was sent through
21 campus mail, so I must have received it around the 30th, yes,
22 of January, 2015.

23 Q. And part of the discussion -- I want to talk to you about
24 the discussion that Dean Coltman and Vice Provost Alperin had
25 with you, and you had your union representative, Mr. Broadfield

1 there, too?

2 A. Yes.

3 Q. Did they talk to you about your safety and the safety of
4 your family? You can go off memory.

5 A. Towards the end of the meeting there was a brief discussion
6 concerning that, as I recall, yes.

7 Q. And at that point in time, did you think they were
8 overreacting? Did you think, look, everything is fine, no
9 problems?

10 A. I don't know. This was almost three years ago.
11 Overreacting to what?

12 Q. They raised safety issues, your family's, your own. Did
13 they say you guys have a problem, you deal with your own stuff.
14 What was your reaction to that?

15 A. I'm not sure if I specifically recall what my reaction was.
16 I think I stated that after the -- being highlighted on the CNN
17 program, that that was really almost too much. There were
18 various emails, things like that. I don't know where they were
19 emanating from, but as far as their being threatening, usually
20 they were laced with profanity, otherwise I dismissed them.

21 Q. Yes. Let's look at the second page of the letter they
22 wrote you, the second to the last paragraph.

23 When asked what your plans were for the immediate future,
24 you said you wanted the media attention to die down. Did you
25 tell them that?

1 A. I may have said something along those lines, yes, in
2 particular in relation to the attention by CNN on successive
3 nights earlier in the month. It would have been about ten days
4 prior to this meeting.

5 Q. You got on CNN?

6 A. No. I declined their offer to the interview.

7 Q. Okay. It says here that despite your statements, you
8 participated in two radio programs on the very same day. Did
9 you do that?

10 A. I participated in one, on the Project Censored program, on
11 the afternoon of January 18th, with William Shibley, who is the
12 director of the Foundation of Individual Rights and Education,
13 a non-profit group in Philadelphia, that also weighed in on my
14 situation later that year, as well as Alex Jones' Info. They
15 asked me to come on, and I went on there.

16 Q. You were on Alex Jones' Info?

17 A. Yes.

18 MR. CURLEY: May I approach?

19 THE COURT: Yes.

20 MR. CURLEY: This is Defendant's 114, your Honor.

21 BY MR. CURLEY:

22 Q. All right, Professor Tracy, I handed you an email, it is
23 marked as 114. It looks like an email from you to someone
24 named Mickey.

25 Do you recognize that?

1 A. Yes.

2 Q. You wrote that, right?

3 A. It appears as if I did, yes.

4 MR. CURLEY: I move Exhibit 114 into evidence.

5 THE COURT: Any objection?

6 MR. LEO: Your Honor, we would like to see the rest of
7 the exhibit.

8 THE COURT: Do you have a copy of it?

9 MR. LEO: It has been redacted, I believe.

10 MR. CURLEY: At their request, your Honor.

11 MR. LEO: No objection.

12 THE COURT: Okay, I just need to be sure, 114, is it
13 in full form or redacted form?

14 MR. LEO: It is in redacted form. We are not
15 objecting to it.

16 THE COURT: That is not what I am looking at.

17 THE ASSISTANT: You have a full one, your Honor.

18 THE COURT: The redacted version is 114, that is what
19 is coming in without objection; is that right?

20 MR. BENZION: That is correct, your Honor.

21 THE COURT: Okay, that is fine. That is admitted
22 without objection.

23 (Whereupon Defense Exhibit 114 was marked for
24 evidence.)
25

1 BY MR. CURLEY:

2 Q. All right, sir, let's see if we can't put 114 into context.

3 So, this is the memo of your meeting, and that was
4 January 18th, right? Do you see that?

5 A. Yes.

6 Q. You met with those folks on the 18th.

7 Now let's see what you wrote to Mr. Huff on the 21st.

8 Okay, let's focus -- who is Mr. Huff?

9 A. Mickey Huff is the Director of Project Censored and he is,
10 I believe, an associate professor of history at a junior
11 college in California.

12 Q. He is not with FAU?

13 A. No.

14 Q. Okay. So you are writing Mr. Huff and let's see what you
15 said.

16 Let's go to the third paragraph there -- let's start with
17 the top one.

18 "Please forward to Andy -- Peter and Andy. Their emails
19 didn't come through on the forwarded email. I wanted to
20 communicate on a non-FAU email."

21 Why is that?

22 A. We got into the habit of using non-FAU email when I was
23 union president because we did not want FAU management to
24 intercept our emails when we were doing blogging or talking
25 about a discipline situation or anything else. They would be

1 able to surveil the communications.

2 Q. So this is an email you felt comfortable with, it was
3 private, you could send it to people without any concerns about
4 FAU seeing it. How does that sound?

5 A. That is fine.

6 Q. Okay. Let's look at the third paragraph, "I met with
7 administrators Friday morning. Our union grievance chair was
8 there as well. They wanted to know if I'd previously filled
9 out an outside activity form to write my blog, of which many
10 posts appeared at Global Research. It really didn't occur to
11 me because I am not being compensated, and it probably amounts
12 to know more than three or four hours per week. Nor was I ever
13 asked to do so by my chair. Although I mentioned that I
14 contribute to GR" -- that is Global Research?

15 A. Yes.

16 Q. -- "I don't plan on using those pieces for promotion
17 because they are not peer review. Yet, they may inform some of
18 my research and teaching. So I am uncertain whether I should
19 fill out such a form for the activity ex post facto."

20 That means after you have done it?

21 A. That means after the fact.

22 Q. "Especially since it might give them reason to take
23 disciplinary action as my remarks may no longer be regarded
24 solely my own free expression. Our union guy suggested I do
25 so, but I am going to get some additional opinions."

1 Is that what you wrote, sir?

2 A. I haven't read this email in years, but I believe so, yes.

3 Q. Okay, let's go on to the next one.

4 "Also, they wanted to know when I put my disclaimer up on
5 my blog" -- we heard a lot about that yesterday, didn't we?
6 You were pretty adamant you told them the disclaimer was on the
7 blog, didn't you?

8 A. Yes.

9 Q. Let's see what you wrote to Mr. Huff.

10 "Also, they wanted to know when I put my disclaimer up on
11 my blog that my views were not representative of the
12 university's. I am having trouble verifying that because the
13 disclaimer appears on a page rather than a post, and I revised
14 it slightly a few times. However, that specific disclaimer was
15 always there."

16 Did you write that?

17 A. With the highlighted portion?

18 Q. The whole paragraph.

19 A. Yes.

20 Q. I don't want to take it out of context.

21 So, they were having issues with whether or not people
22 blogging on to your blog -- logging on, looking at articles,
23 didn't see the disclaimer. You were having the same problem,
24 too, right?

25 A. Even when the university wrote me a disclaimer and required

1 me to put it on the blog in late 2013, and agreed to take the
2 discipline letter out of my file, that entire disclaimer was
3 never on the front page either. There was a link to it, we
4 agreed there would be a brief disclaimer and a link to the full
5 disclaimer on the page that the posts appeared.

6 Q. Okay. Next paragraph, "Other than that, they just said the
7 university is getting a lot of heat and expressed concern about
8 my safety, as well as my family's."

9 Did that bother you, that they were concerned about your
10 safety and your family's safety?

11 A. I was happy to hear they were concerned.

12 Q. Let's see what you wrote about that. "Most of the pleas
13 for my dismissal are quite shrill." Are you mocking those or
14 what does that mean when you say they are quite shrill?

15 A. I am not sure, I may be referring to the emails that I
16 received.

17 Q. Okay. It says, "Here's one you will enjoy. The theme of
18 Censor 2013 is, of course, Fahrenheit 451. I have it assigned
19 this term, and according to the Associate Provost, someone went
20 into our campus bookstore and tore my chapter out of the book!"

21 You thought that was pretty funny?

22 A. I don't know if it was hilarious, that was conversation.

23 Q. That didn't concern you, that people were going in and
24 destroying school property and maybe sending messages? Weren't
25 you concerned about the safety of yourself, the family, the

1 faculty?

2 A. Well, 2013 was rather detrimental, we had the Stomp on
3 Jesus conference in the School of Communication and Multimedia
4 Studies.

5 Q. He still works there, doesn't he?

6 A. He does. He received numerous death threats or threats
7 because of this, because of the coverage of the incident in the
8 press, and he was pulled out of the classroom.

9 Q. A lot of people viewed Mr. Poole's -- it was a classroom
10 assignment -- as distasteful, didn't they?

11 A. I believe so. Certain portions of the public did, yes.

12 Q. But he still has his job at FAU, doesn't he?

13 A. I don't know.

14 Q. Was he tenured?

15 A. He was an instructor, so he did not have tenure, no.

16 Q. Okay. All right. Did I cut you off? Is there something
17 else you wanted to say about that?

18 A. Well, my point is that I was never pulled out of the
19 classroom, so the concern for my safety must have been in fact
20 slight.

21 Q. Oh. It looks like the only person that thought it was
22 slight was you. This is the way your email is written. Do I
23 have that wrong? I don't see anything in here where you are
24 suggesting the school isn't doing what it should do to protect
25 me and my family. The way I read this, you are saying the

1 school asked about me and my family and --

2 MR. LEO: Objection, counsel is testifying.

3 THE COURT: Sustained.

4 BY MR. CURLEY:

5 Q. Are you saying in here the school should do more? This is
6 a confidential email.

7 MR. LEO: Objection, best evidence.

8 THE COURT: Overruled.

9 THE WITNESS: Could you restate the question? You are
10 trailing off.

11 BY MR. CURLEY:

12 Q. I am, I am sorry.

13 Yes, I was wondering if there is some suggestion in here
14 that you think more things should be done for the safety of
15 yourself, your family, the students, faculty, anyone?

16 A. I don't know of there being any study or exploration on
17 behalf of the administration following what took place in
18 January 2013 concerning my remarks about Sandy Hook, school
19 safety or anything of the like. If there has been, it has not
20 been produced in discovery by the Defendants.

21 Q. Can we go back to 15.

22 They sat down and had a long conversation with you, right,
23 wanted to talk to you about it, right?

24 A. The conversation, as I recall, the meeting that took
25 place -- and of course, we discussed this at length yesterday,

1 I don't want to belabor it. The meeting that took place was
2 probably 40, 45 minutes and a few minutes were apportioned for
3 remarks on safety, are you concerned for your safety and so
4 forth.

5 Q. "I expressed concern for your safety and urge you to
6 immediately forward any emails you perceive as threatening. I
7 asked you what your perceived level of threat was."

8 Is that not enough?

9 A. I believe I shared with them what my perceived level of
10 threat was.

11 Q. You sure did. Let's look at Exhibit 16. That is the
12 letter you wrote after your conversation, your email
13 conversation with Mr. Huff that we just looked at.

14 MR. LEO: I object to the comments counsel is making.
15 You sure did, counsel is testifying.

16 THE COURT: Sustained. I ask the jury to disregard
17 counsel's comments.

18 MR. CURLEY: Exhibit 16, I move 16 into evidence.

19 THE COURT: That is in. Defense 16 is in.

20 BY MR. CURLEY:

21 Q. Let's look at the second page, last paragraph. Let's see
22 what you had to say about safety issues.

23 "Your letter expresses the FAU administration's concern
24 over the safety of the institution's students, faculty and
25 staff. If the administration believes that the inordinate

1 media attention afforded my public remarks poses a security
2 concern for the university's constituents then it has the right
3 to act on such concerns."

4 Is that what you told them?

5 A. This is what I was advised to include in the letter from
6 United Faculty of Florida Service Director Michael Moats.

7 Q. And you did, didn't you?

8 A. Yes.

9 Q. Okay.

10 THE COURT: You can let me know when you are going to
11 a new area, we will take our mid-morning break.

12 MR. CURLEY: This would be perfect, your Honor, thank
13 you.

14 THE COURT: All right. Ladies and gentlemen, we will
15 take our mid-morning break. I remind our witness you are under
16 oath. And, ladies and gentlemen, five minutes after 11:00 or
17 so, same important instruction, do not discuss the case among
18 each other, review media or have any contact with anyone
19 associated with the case. We will see you back in 15 minutes.
20 Thank you.

21 *(Thereupon, the jury leaves the courtroom.)*

22 THE COURT: Okay, we will be in recess.

23 *(Thereupon, a brief recess was taken.)*

24 THE COURT: All right. We are going to bring our
25 jurors in.

1 I am going to ask counsel, whoever the attorney is
2 doing the questioning or cross-examining should be doing the
3 objections. It gets confusing and makes for a sloppy record.
4 So if you would coordinate on that.

5 MR. LEO: Yes, your Honor.

6 THE COURT: All right. Bring the jury in.

7 (Thereupon, the jury returned to the courtroom).

8 THE COURT: Welcome back, everyone. You may be
9 seated.

10 We can pick up with the cross-examination.

11 MR. CURLEY: Thank you, your Honor. May it please the
12 Court.

13 THE COURT: Yes.

14 BY MR. CURLEY:

15 Q. Mr. Tracy, I handed you a document marked Exhibit Number
16 78. Did you look at that?

17 A. Yes.

18 Q. That is a letter you received from Vice Provost Diane
19 Alperin?

20 A. Yes, myself and at the time, the union attorney.

21 Q. All right.

22 MR. CURLEY: We move Exhibit 78 into evidence, your
23 Honor.

24 MR. LEO: Objection, hearsay.

25 THE COURT: Response.

1 MR. CURLEY: This is for purposes of notice in
2 connection with the disciplinary action. It will be later
3 authenticated and put into evidence by Dean Alperin. For
4 purposes of now, it is a notice to Professor Tracy of
5 additional issues.

6 THE COURT: Can you ask without -- do you have another
7 way to get the exhibit in that is not hearsay?

8 I was pretty strict with Plaintiffs yesterday in terms
9 of having documents coming in that were otherwise hearsay. If
10 you have another witness through whom it can come in, you can
11 inquire -- you can show it to the witness, but not have him
12 testify about the content, and ask questions as relate to
13 notice.

14 MR. CURLEY: All right.

15 THE COURT: At this point, we will have 78 marked at
16 this point. If you seek to move it in with another witness,
17 let me know.

18 MR. CURLEY: Thank you, your Honor. May I proceed?

19 THE COURT: Yes.

20 BY MR. CURLEY:

21 Q. Professor Tracy, at some point in time Vice Provost Alperin
22 brought to your attention that you had participated in a book
23 called Sandy Hook, right, Nobody Died at Sandy Hook?

24 A. At what time?

25 Q. How about January 4, 2016.

1 A. Yes.

2 Q. And another item that she mentioned in here had to do
3 with --

4 MR. LEO: Objection, hearsay.

5 MR. CURLEY: I withdraw the question.

6 THE COURT: Okay.

7 BY MR. CURLEY:

8 Q. Did she bring to your attention issues relating to Global
9 Research?

10 A. GlobalResearch.ca?

11 Q. Yes. Did she bring issues in there to your attention?

12 A. In reference to Exhibit 78, yes.

13 Q. For the moment we will stay away from the content of the
14 document, we just need to talk about it.

15 A. Sure.

16 Q. And she brought these things to your attention on
17 January 4, 2016. Does that sound right?

18 A. Yes.

19 Q. All right. And just so we can put things into context, by
20 this time you had received notice of intent to terminate your
21 employment, right?

22 A. Yes, that would have been 20 days -- 18 days prior,
23 roughly, December 16.

24 Q. And during that period of time, your attorney, so the jury
25 knows who that is, that is Mr. Johnson; is that right?

1 A. Thomas Johnson.

2 Q. Your attorney asked for an extension from the school, and
3 the school gave it to him?

4 A. I believe it was Mr. Johnson and/or Michael Moats who was
5 UFF's representative.

6 Q. Someone on your behalf asked for an extension of time,
7 right?

8 A. Yes. That is correct.

9 Q. I think you said yesterday nobody responded on your behalf,
10 right?

11 A. Yes.

12 Q. And the response that you were looking for was some sort of
13 explanation to the Notice of Discipline -- maybe we should put
14 that up.

15 December 16, Defendant's 29, if you could put it up,
16 please, just so we have things in context here.

17 THE COURT: I don't have Defendant's 29 as marked in
18 evidence. It may have been one of the ones that is
19 Plaintiff's.

20 MR. CURLEY: Plaintiff's 43 already in evidence.

21 THE COURT: No objection to 29 being admitted?

22 MR. LEO: No objection, your Honor.

23 THE COURT: Okay, admitted without objection.

24 (Whereupon Defense Exhibit 29 was marked for evidence.)
25

1 BY MR. CURLEY:

2 Q. So we have things in context, the letter of proposed
3 discipline is on the 16th?

4 A. Yes.

5 Q. And an extension is given to Mr. Moats or Mr. Johnson on
6 your behalf, right?

7 A. Because the university was on break between Christmas and
8 New Years, yes.

9 Q. And then on the 4th, you received notice from Vice Provost
10 Diane Alperin that there are some issues relating to a book
11 called Nobody Died at Sandy Hook. What is the rest of the
12 title, Dema Hoax, something like that?

13 A. I am not sure.

14 Q. It was a FEMA drill to promote gun control. Is that the
15 rest of the title?

16 A. I believe so.

17 Q. That is what it looks like?

18 A. I believe so, yes.

19 Q. This one is the second edition?

20 A. I think so. It would be helpful to look at it closer.

21 Q. Sure.

22 A. This is 2016 revised, yes.

23 Q. That one -- you knew that was going to go into publication,
24 right?

25 A. I don't know.

1 Q. You don't know?

2 A. I'm not sure.

3 Q. Okay.

4 A. I think this was published sometime in early to mid 2016.

5 Q. All right. With or without your okay?

6 A. At that time, I was terminated, so --

7 Q. Were you okay with it going into publication? That is my
8 question.

9 A. Yes.

10 Q. When Vice Provost Alperin wrote to you on January 4, 2016,
11 she was giving you -- she was talking about the first edition,
12 correct?

13 MR. LEO: Objection, hearsay.

14 THE COURT: Rephrase.

15 BY MR. CURLEY:

16 Q. When you said that you got word from the Dean or from Vice
17 Provost there was an issue with the book, right?

18 A. Yes.

19 Q. Okay. At that point in time, that was the first edition,
20 right?

21 A. I believe so, yes.

22 Q. Did you ever disclose to the school that either you were
23 writing a book called Nobody Died at Sandy Hook or that you
24 were contributing to it?

25 A. This was in the fall of 2015?

1 Q. Right.

2 A. I was on paternity leave.

3 Q. Okay. My question stands. Did you disclose to the school
4 that you were participating in a book or contributing to a
5 book, writing a book, however you want to describe that? Did
6 you disclose that?

7 MR. LEO: Objection, compound.

8 THE COURT: Overruled.

9 A. The people who put this book together approached me to use
10 a couple of my blog posts, and I consented to that. I did not
11 consider it to be academic work and therefore I did not
12 disclose it, no.

13 BY MR. CURLEY:

14 Q. That is the answer to my question. You didn't disclose it,
15 right?

16 A. I did not.

17 Q. All right. And the memoryhole blog, you never wrote that
18 in any of the disclosure forms either, did you?

19 A. You are talking about which forms?

20 MR. CURLEY: May I approach, your Honor?

21 THE COURT: Yes.

22 MR. CURLEY: This is in evidence, your Honor, but I am
23 going to use Defendant's 24, and ask that it be admitted.

24 THE COURT: Any objection?

25 MR. LEO: No objection.

1 THE COURT: All right. Defense 24 admitted without
2 objection.

3 (Whereupon Defense Exhibit 24 was marked for evidence.)

4 BY MR. CURLEY:

5 Q. We looked at this yesterday, I don't want to spend too much
6 time on it, but here are the forms you submitted. When you get
7 to memoryhole, let me know.

8 A. Memoryhole is not on the forms. I understand what you
9 mean.

10 Q. Okay. All right. And then let me ask you -- I will
11 digress for a minute. You heard the expression during your
12 time with the union, I am sure, comply and grieve, right?

13 A. On occasion, yes.

14 Q. Can you explain what that means?

15 A. My understanding is that to -- for an employee to avoid a
16 charge of insubordination by management they should follow the
17 directive of the supervisor and then file a grievance.

18 Q. All right. Do you know Dr. Kajiura, the fellow that
19 testified before you?

20 A. I do not.

21 Q. He talked about when he got money for grants he disclosed
22 it. Do you think that was appropriate?

23 A. I believe he received tens of thousands of dollars for
24 grants, yes.

25 Q. Okay. And he talked about -- no, he actually didn't,

1 strike that.

2 So, let's get back to 24 for a minute. Second page,
3 please. This is Dean Coltman's response to you, and I think
4 she was pretty clear that she wanted you to respond, but --

5 MR. LEO: Objection, counsel is testifying.

6 THE COURT: Sustained.

7 MR. CURLEY: Okay.

8 BY MR. CURLEY:

9 Q. She says this is not optional. You see that, right?

10 A. Yes.

11 Q. And she is giving you until December 14, 2015, at 5:00 p.m.
12 to respond, right?

13 A. Yes.

14 Q. I think you said yesterday you were on paternity leave and
15 you weren't checking your emails. Did I hear that right?

16 MR. LEO: Objection, mischaracterization of the
17 testimony.

18 A. Paternity leave --

19 THE COURT: Just a minute. Overruled. Did the
20 witness answer?

21 THE WITNESS: Restate it, please.

22 BY MR. CURLEY:

23 Q. You were on leave, you didn't get the emails and you didn't
24 get it until late, and that is why your response was a day
25 late. How does that sound?

1 A. Well, this is when the university goes into recess.

2 This is the last day of classes, or exams, I believe was on
3 Thursday, the 10th, or Friday, December 11th, somewhere along
4 those lines, and so it is more or less down time. Even though
5 I was on parental leave, I was not checking my email on a
6 regular basis, Monday through Friday, particularly when the
7 university is going into leave.

8 I have a sense of university life and function through my
9 wife who is employed there on a 9:00 to 5:00 basis. So, at the
10 time classes were not in session or anything of the like.

11 So, to answer your question, I was not checking it on a
12 Monday, Tuesday, Wednesday, Thursday, Friday basis.

13 Q. Was the suggestion that you were too busy or some reason
14 why you couldn't be checking your emails?

15 A. Sorry?

16 Q. Were you trying to suggest -- suggest to the jury that
17 there was some reason why you couldn't --

18 A. Some reason?

19 Q. Yes -- monitor your emails, make sure anything the school
20 is sending out, you are checking it out? There were some
21 things going on?

22 A. Yes. Okay.

23 Q. Okay. So, let me ask you this --

24 MR. CURLEY: Could I approach, your Honor?

25 THE COURT: Yes.

1 MR. LEO: What is the document?

2 MR. CURLEY: 165.

3 MR. LEO: Thank you, sir.

4 MR. CURLEY: Uh-hum.

5 BY MR. CURLEY:

6 Q. All right, sir, do you recognize that?

7 A. Yes.

8 Q. What is that?

9 A. That is an email, a couple of emails, but one that I sent
10 to Dr. James Fetzer and another individual, Tony Meadow, on
11 December 13th, Sunday.

12 Q. Okay. So this is -- just so we get things in chronological
13 order here, we are looking at the email that Dean Coltman sent
14 you on the 11th, right?

15 A. Yes.

16 Q. And the email here --

17 MR. CURLEY: I move 165 into evidence, your Honor.

18 MR. LEO: Your Honor, may I be heard on a few issues?

19 THE COURT: I thought we took this up already.

20 MR. LEO: Lack of foundation. There is no evidence
21 that this is from the school email and it's not clear on the
22 document what email it was sent from.

23 And second, hearsay was our objection. Your Honor
24 indicated there would be a limiting instruction with respect to
25 the hearsay statement.

1 *THE COURT:* Okay, all right, I am going to overrule
2 the objection on 165 as it relates to what email it was on, it
3 is a statement of Dr. Tracy. What email wouldn't appear
4 relevant.

5 Ladies and gentlemen, to the extent that there is
6 information contained in the email that is not a statement
7 made, or in this case written in the email, by Dr. Tracy, those
8 statements are not being admitted for the truth of the matter.

9 Anything that Dr. Tracy wrote is evidence for the
10 truth of what he wrote, but if something else is quoted, for
11 example, that someone else said, that is not to be considered
12 for the truth of the matter.

13 (Whereupon Defense Exhibit 165 was marked for evidence.)

14 *MR. CURLEY:* If we could put 165 up on the screen,
15 please.

16 *BY MR. CURLEY:*

17 *Q.* This email is an email you wrote, it looks like
18 December 13, 2015, right?

19 *A.* Yes.

20 *Q.* That was two days after the email that the Dean sent you,
21 right, or the Vice Provost?

22 *A.* This was sent from my personal email.

23 *Q.* Okay, from James Tracy, so you are on your personal emails.
24 You weren't checking your work emails?

25 *A.* This was done by residence, my home, so I can't --

1 Q. You can't get your work emails at home?

2 A. I could remotely access, yes.

3 Q. Of course, but you weren't. Is that what you are saying?

4 A. Once again, I was on paternity leave, I wasn't doing it
5 every day. I was not teaching at the time, and I had no
6 service commitments for the fall of 2015.

7 Q. Okay.

8 THE COURT: So you are switching from computer to ELMO
9 right now.

10 MR. CURLEY: For the moment.

11 BY MR. CURLEY:

12 Q. So, we looked at this yesterday, this is the letter that
13 the Pozners wrote in the newspaper, right?

14 THE COURT: For reference, that is Plaintiff's 61 on
15 the screen.

16 BY MR. CURLEY:

17 Q. And this is written on December 10, 2016?

18 A. That is when it was published online, yes.

19 Q. And you were aware of this, and you were watching this,
20 right?

21 A. I am not sure what you mean by watching.

22 Q. When it was in the paper, you saw it. Did you see it?

23 A. I did see it, yes.

24 Q. Okay. 165, so this was the response you submitted to the
25 Pozner letter, right?

1 A. This was the initial response and I submitted a revised one
2 which was published.

3 Q. Now, you submitted this, though, I want to be clear about
4 that, right?

5 A. I submitted this, yes.

6 Q. Okay.

7 A. These are not my words, but I did submit it.

8 Q. They are not your words?

9 A. Correct.

10 Q. Whose words are they?

11 A. Professor Fetzer's.

12 Q. Is that a colleague of yours?

13 A. Not an immediate colleague, no. He is a co-worker, yes.

14 Q. That is the guy on the book, Jim Fetzer?

15 A. Yes, he is the co-editor.

16 Q. So he co-edited your letter, too, right?

17 A. He sent me something to respond to the Pozners' defamatory
18 article in the Sun Sentinel. He suggested to send an email,
19 the text of the letter saying respond with something like this.

20 I did initially submit that. I had second thoughts, I
21 thought it was too harsh, so I wrote my own piece.

22 Q. I see. It reads like it is something that you wrote, the
23 attack upon me and Jim Fetzer, Ph.D.?

24 A. Yes, it was edited by me.

25 Q. You edited it?

1 A. Yes.

2 Q. Okay. So, in the end, these were your words, right?

3 A. They were presented as my words, yes.

4 Q. Okay. Earlier, we talked a lot about personal and
5 research, and things like that, and certain types of research
6 that counts and certain types of research that I guess doesn't
7 count.

8 Here what is highlighted, "extensive research by several
9 academics, including Fetzer and myself, has been done on the
10 Sandy Hook massacre." Sounds like you are saying -- I don't
11 want to puts words in your mouth, you didn't use the word
12 scholarly, but you talk about extensive --

13 MR. LEO: Objection, counsel is testifying.

14 A. These are not my words, they are primarily his words. He
15 wanted to promote his book.

16 BY MR. CURLEY:

17 Q. You are getting ahead of me. I wanted to ask you about
18 that. You edited this, don't you take responsibility for your
19 words?

20 A. This particular piece?

21 Q. Yes. You just told the jury you edited this before it went
22 out.

23 A. I modified it and submitted this.

24 Q. Why didn't you take this out if it is not accurate?

25 A. I don't know. At the time I was distraught.

1 Q. Did Mr. Fetzer force you to send this out, were you under
2 duress?

3 A. No.

4 Q. Okay. All right. Let's go to the last couple of
5 paragraphs of the second page, please. Thank you. Can you
6 highlight those.

7 There is an awful lot in here. You see where it starts,
8 because of Amazon's ban where you can see a hundred photographs
9 in vivid color and, etc. etc. These are the photographs of the
10 victims of Sandy Hook, right?

11 A. No.

12 Q. No?

13 A. These were photographs that I believe were leaked, they
14 somehow fell into the hands of Australian researcher Allen
15 Poole, and they show before and after the Sandy Hook event, the
16 preparation for it.

17 The photographs are suggestive that the event was a drill
18 and that is why they are included in the book. That is my
19 understanding.

20 Q. The book that we are talking about, Nobody Died at Sandy
21 Hook, you had by my count 120 pages of content in that thing,
22 right?

23 A. I had an appendix in the book, something that was included
24 as the appendix, which is the timeline I believe I discussed
25 earlier in the testimony. The timeline was compiled over a

1 course of a couple of years. It is like the timeline you had
2 in the opening remarks yesterday concerning the situation, but
3 this timeline was on the Sandy Hook event from several years
4 prior to the event, the event transpiring and events subsequent
5 to December 14th of 2012.

6 That appeared in mainstream outlets, that appeared in
7 alternative news outlets, and this is something that was not a
8 he is say or anything of the like. I don't think it
9 constitutes research in the way I described it yesterday, it is
10 a compilation of synopses of news articles. You are saying 120
11 pages.

12 Q. I want to be accurate here. Your timeline was only a
13 hundred pages.

14 A. Okay.

15 Q. You can keep going, but I don't want to misquote you. It
16 is a hundred pages.

17 You talked about my timeline for the opening. That took me
18 days to get ready for it.

19 A. I am talking about concept, not length.

20 Q. So, how long did it take you to write a hundred page
21 timeline?

22 A. It is something that developed on the blog over the course
23 of probably about a year and a half to two years.

24 Q. Okay. So I am clear, this was never disclosed to the
25 school, right?

1 A. No.

2 Q. Is there something --

3 A. It is nothing I would ever submit to a scholarly journal or
4 anything of the like, as I attempted to discuss yesterday, and
5 distinguish between academic research and blogging.

6 Q. You have academic research and blogging. Where does
7 extensive research fall in?

8 A. There can be such a thing as extensive pedestrian research.

9 Q. Are you the one who decides those things, where they fall
10 in? We have academic research, extensive research, and then we
11 have blog.

12 Who decides in the spectrum where that falls in?

13 A. I think the protocols for scholarly or academic research
14 are fairly clear, they are stated in each discipline,
15 communication studies, the historical discipline has the
16 American -- American Psychological Association. All of the
17 disciplines have organizations that govern the rigors with
18 which scholarship must go through in order to appear as a
19 revered work, a book, a chapter in a book, or the equivalent.

20 So, what appeared in the book that you have as an exhibit
21 and that we are discussing and you are referencing, this is not
22 scholarly work.

23 Q. Okay. So, if Dean Coltman or Vice Provost Alperin hears
24 about that or sees that, and says, look, we think you ought to
25 report it so we can talk about whether it is a conflict or not,

1 let's discuss it, is that something reasonable for them to ask
2 or is it crazy to think 120 pages of material, that could not
3 possibly been something that you ought to disclose as research
4 for an outside professional activity? Is that a crazy notion?

5 A. A hundred of the -- a hundred pages of synopses of news
6 articles, as I mentioned previously, I don't consider it
7 scholarly.

8 Q. You don't, but if you tell somebody about it, would it be
9 fair for them to think that might be scholarly, that is a
10 hundred pages of information about an event? That may be
11 something we ought to talk about? Is that a fair question?

12 A. I think that is the essence of this case, should I submit
13 it to a state institution, my public speech, for scrutiny.

14 Q. Unless you put it up there, and then they decide and say,
15 you know, we looked at your article, you've got to take it
16 down, now that is censorship, isn't it?

17 A. Yes. That is true.

18 Q. You never got there. They never had an opportunity to say
19 take it down or tell you blog til your heart's content. How do
20 you know until you have a discussion?

21 A. I was never invited into a discussion. I would have gladly
22 liked to have one. I sent repeated emails. FAU administration
23 knew I was available, I was accessible. They could have
24 contacted me and called me in any time throughout the fall of
25 2015, and that would have happened.

1 MR. CURLEY: May I approach, your Honor?

2 THE COURT: Yes.

3 BY MR. CURLEY:

4 Q. Exhibit Number 1, Defendant's, you don't need to put it up.
5 Maybe one page.

6 That is Exhibit Number 1. Do you recognize that, sir?

7 A. Yes.

8 Q. That is the collective bargaining agreement you signed as
9 the president, right?

10 A. Yes.

11 MR. CURLEY: I move Exhibit 1 into evidence.

12 MR. LEO: No objection.

13 THE COURT: Defendant's 1 admitted without objection.

14 (Whereupon Defense Exhibit 1 was marked for evidence.)

15 BY MR. CURLEY:

16 Q. The same conflict provisions we have been talking about the
17 whole time here, all right, identical, are in this. The one
18 you signed on behalf of your union, they are in the same one
19 that you are claiming all kinds of confusion about, right?

20 A. By the same one, you mean the same CVA 2012-2015?

21 Q. No, the language in outside activities, conflict of
22 interest, Article 19, didn't change a word, did it?

23 A. No.

24 Q. All right. Okay, let's finish this thing you wrote for the
25 newspaper. On the last page, we were getting to it.

1 You said yesterday you weren't marketing the book. Did I
2 hear you right?

3 A. Yes. Yes.

4 Q. When I read this, I get the impression you are marketing
5 the book. Why --

6 MR. LEO: Objection, counsel is testifying.

7 THE COURT: Sustained.

8 BY MR. CURLEY:

9 Q. Why isn't this marketing the book?

10 A. Are you pointing to a particular passage?

11 Q. Sure, the last sentence. There is plenty of them in here,
12 but that one will do.

13 MR. LEO: Objection, counsel is testifying.

14 THE COURT: Sustained.

15 BY MR. CURLEY:

16 Q. Here you are, "Don't take my work for it, just do a search
17 on the title for a free copy of the book." Do you see that?

18 A. I am not sure that marketing a free book is a contradiction
19 of terms.

20 Q. Oh, really?

21 A. Yes.

22 Q. What would you call trying to get people to get the book?

23 A. A market or marketplace suggests that money exchanges hands
24 for goods. The book was --

25 Q. All right --

1 A. If I may.

2 Q. Sure.

3 A. The book was somehow -- my understanding is that Amazon
4 ceased sale of the book and this was in November of 2015. Even
5 though it received numerous reviews on Amazon websites and
6 there were sales and so forth, it was withdrawn by Create
7 Space, and so, at that time, it was placed on a website and it
8 was freely downloadable as a pdf, and this one scan was
9 sometime, I believe, in September 2015.

10 Q. That is in the letter you wrote to the newspaper. It says,
11 "The book which presents hundreds of proofs that the shootings
12 at Newtown, Connecticut Sandy Hook school on the 14th of
13 December, 2012 was staged enjoyed brisk sales of 500 copies."
14 Is that true? Those are your words, right?

15 A. I don't know if this is true, this is an amalgamation, this
16 is something I edited for submission.

17 I am not a -- I don't know how many sales went through to
18 Amazon.

19 Q. You said you sent this to the newspaper, didn't you?

20 A. I did.

21 Q. And you are telling me you didn't know if it was accurate
22 or not?

23 A. This is something passed on to me, presented to me by Dr.
24 Fetzer, and I think he is a stickler for accuracy.

25 Q. Okay. So you trusted Dr. Fetzer to give you accurate

1 information?

2 A. Concerning the sales of the book. He is the editor,
3 co-editor of the book, so he was in charge of contracting with
4 Create Space, which I believe is the imprint of Amazon.com for
5 publication of the book.

6 Q. What we just read about brisk sales on Amazon, it sounds
7 like the book is moving quick, that sounds like marketing. Is
8 that marketing to you?

9 MR. LEO: Objection, counsel is testifying.

10 THE COURT: Sustained.

11 BY MR. CURLEY:

12 Q. Is that marketing in your opinion?

13 A. I don't know how it could be, the book at that time was not
14 for sale and I was not anticipating any proceeds.

15 Q. You said yesterday you got honorariums?

16 A. There was a discussion of an honorarium, I think in
17 November of 2015, I don't know. There was not a specific
18 figure, and I didn't pay a great deal of attention to it.

19 Q. You cashed the checks, didn't you?

20 A. In 2016, I was unemployed, yes, those funds went to my
21 legal defense fund.

22 Q. And the book itself talked about your work at FSU, didn't
23 it?

24 A. Which book?

25 Q. Both edition number one and edition number two. Even after

1 you were gone, you were talking about all of your scholarly
2 work at FAU, weren't you?

3 A. I am not sure what specific language you are referring to.

4 Q. Well, let's look at the first edition.

5 James Tracy, Ph.D. Associate --

6 MR. LEO: Objection, your Honor, this book is not in
7 evidence, this entire book is not in evidence. It is improper
8 for counsel to be reading from something not in evidence.

9 THE COURT: Is there an exhibit you are seeking to
10 have admitted or a question you want to ask the witness?

11 MR. CURLEY: We will put the book into evidence. We
12 were going to admit it anyway, your Honor.

13 MR. LEO: We object to the book being admitted in its
14 entirety.

15 Your Honor, this may be appropriate for sidebar.

16 THE COURT: We will take up number three in terms of
17 admissibility.

18 Are you able to ask any questions without the exhibit
19 being in at this point?

20 MR. CURLEY: The question I really want to ask, I
21 would prefer that the jury could see it.

22 THE COURT: Is it portions of the book that were
23 written by Dr. Tracy as opposed to potentially other portions
24 that were not, is that what you are wanting to show him?

25 MR. CURLEY: I am happy to show them the 120 pages.

1 *THE COURT:* All right. Is there an objection?

2 *MR. LEO:* Assuming he could lay a foundation.

3 *THE COURT:* All right. What exhibit is this? It is
4 not in evidence. We are talking about Exhibit 3. Go ahead and
5 proceed.

6 *MR. CURLEY:* May I approach, your Honor?

7 *THE COURT:* You may.

8 *MR. CURLEY:* Maybe now is a good time to take a lunch
9 break, your Honor. I don't want to take much time when we
10 could be moving forward.

11 *THE COURT:* Okay. I will give you a minute to talk
12 with counsel to see if it can be resolved.

13 *MR. CURLEY:* All right.

14 *THE COURT:* We came back from our mid-morning break at
15 about 11:14.

16 *MR. CURLEY:* I am fine, I didn't want to hold you up.

17 *THE COURT:* All right.

18 *MR. LEO:* Your Honor, counsel -- we haven't looked at
19 every single page. If you could represent for the record it is
20 just the first six pages and two blog posts that were put into
21 the book and the disputed material he is trying to get a
22 foundation for.

23 *THE COURT:* I will allow you to proceed addressing
24 those issues with the questioning.

25 If you want to represent to them what you handed to

1 the Plaintiff, that is fine.

2 *BY MR. CURLEY:*

3 Q. I handed to you what appears to be a copy, what appears to
4 be a downloaded copy of the book Nobody Died at Sandy Hook?

5 A. Yes.

6 *THE COURT:* That is Exhibit 3?

7 *MR. CURLEY:* Yes.

8 *THE COURT:* All right.

9 *THE WITNESS:* Without the cover.

10 *BY MR. CURLEY:*

11 Q. Did the cover look like this one or did it change?

12 I am sorry.

13 A. I think they are similar or the same. I think they are
14 similar, I am not sure.

15 *THE COURT:* When you say "this one", does that hard
16 copy book have a hard copy number?

17 *MR. CURLEY:* Defendant's 38.

18 *THE COURT:* I will make a note of. It we are marking
19 that, that is what you were showing him, okay.

20 *BY MR. CURLEY:*

21 Q. All right. Professor Tracy, when you wrote the email --
22 can you bring that back up, please.

23 When you wrote that email, you were talking about that
24 book?

25 A. Yes.

1 Q. The one in front of you?

2 A. Yes.

3 MR. CURLEY: I move Exhibit 165 into evidence -- not
4 165, Exhibit 3.

5 THE COURT: Is Exhibit 3 the entire book or the
6 excerpts from the book?

7 MR. CURLEY: It is the excerpts that are attributable
8 to Professor Tracy.

9 THE COURT: It is a subset of the book, it is the
10 hundred or so pages that Dr. Tracy said he wrote, or are you
11 attempting to establish that foundation?

12 MR. CURLEY: I haven't asked him that yet.

13 THE COURT: You want to ask him that.

14 MR. LEO: I want to make clear for the record, our
15 Exhibit 3 is the entire book, I believe.

16 THE COURT: Well, that is the one I just had marked,
17 the entire book.

18 MR. LEO: Yes, 421 pages here as Exhibit 3.

19 THE COURT: Let's have Mr. Curry be clear on the
20 record. What is contained in Exhibit 3 just handed to the
21 witness?

22 MR. CURLEY: The beginning of the book, I don't have
23 it, Professor Tracy does, five or six pages, the page that
24 talks about Professor Tracy isn't working at FAU, and Chapter
25 1, which is -- I can't remember the name off the top of my

1 head -- an article that I believe he wrote, and then his
2 timeline we talked about.

3 *THE COURT:* Anything that can establish that Dr. Tracy
4 wrote it, I will allow it to come in. If there are portions he
5 did not write, I will have that excluded at this point until I
6 hear further argument.

7 Is everything he has what he or you need to ask him
8 that question?

9 *MR. CURLEY:* Let's ask him.

10 *THE COURT:* Okay. Speak loudly.

11 *MR. CURLEY:* Okay.

12 *BY MR. CURLEY:*

13 Q. I don't want to stand over your shoulder. There is enough
14 stress in the courtroom as it is.

15 The documents you have, why don't you -- without describing
16 each page, please, just if you would tell us what they are and
17 what -- I want to know what you wrote, and I want to know what
18 you were aware of when 165 -- do you still have that in front
19 of you, the article--

20 *MR. LEO:* Objection, compound.

21 *BY MR. CURLEY:*

22 Q. 165, what you were aware of at the time you wrote that?

23 A. Yes.

24 *THE COURT:* Objection overruled. You may proceed.

25 *THE WITNESS:* I have that. Yes.

1 BY MR. CURLEY:

2 Q. Yes, that is a timeline for you. All right, sir?

3 A. 165 is the email, September 13th email.

4 Q. Yes, sir, I'm talking about the book.

5 All right. Go ahead. What did you write and were you
6 aware of everything you see there?

7 A. You want the first several pages -- I am confused. You
8 want the first several pages of the book, to describe that, or
9 do you want what I was involved in writing, to describe what I
10 was involved with writing?

11 Q. Let's go with what you were involved with writing and we
12 will get that out of the way.

13 A. After the table of contents, copyright page, there is also
14 Mike Palachek, who is the co-editor of the book, has written
15 extensive fiction works and so there is a page of that, I did
16 not write that, as well as non-fiction, I think about 20 books.

17 There is a table of contents, and then there is the
18 contributors' page, contributors' bios, including a bio of me
19 and my affiliation with FAU.

20 Q. And what about the articles?

21 A. There is the article which I did not title, it says,
22 Medical Examiner, More Questions Than Answers, I think this is
23 something that the editors substituted a title for, but it is
24 the post that was published at the blog memoryholeblog on
25 December 24th.

1 Q. You wrote the blog?

2 A. I wrote the post that appears as a chapter in the book.

3 Q. And what else?

4 A. And the Sandy Hook timeline that we were discussing.

5 Q. How many pages is that?

6 A. I don't -- hold on.

7 Q. Are there page numbers on it?

8 A. I was going to look for page numbers in the table of
9 contents.

10 Let's see, 245 to 353, so 108.

11 Q. All right. How long was the article -- the blog post
12 article?

13 A. Well, it varied depending on the time one looked at the
14 blog, because I might go in and put a couple synopses of the
15 news articles online as they occurred, and I did this, as I
16 say, for about a year and a half or two years, and so it was an
17 overview, a timeline, as the title suggests, of all of those
18 synopses of the news articles.

19 Q. All right. All of those pages, were you aware they were in
20 the book?

21 A. At what time?

22 Q. At the time that you wrote for the Sun Sentinel and that
23 letter that I showed you.

24 A. Yes.

25 Q. Okay.

1 MR. CURLEY: I would move that into evidence, your
2 Honor.

3 THE COURT: Response.

4 MR. LEO: Your Honor, I don't believe he asked him if
5 he wrote everything that he was referring to.

6 THE COURT: Well, he described everything and he said
7 what he wrote.

8 MR. LEO: Your Honor, I believe --

9 THE COURT: What is being objected to?

10 MR. LEO: The table of contents and the bio, he did
11 not say he wrote that.

12 THE COURT: The table of contents and the bio?

13 MR. LEO: Yes, the first six pages.

14 THE COURT: Any objection from Defense for those
15 portions to be redacted and the rest would be admitted?

16 MR. CURLEY: No, your Honor, that is not satisfactory.
17 He was aware of those pages.

18 THE COURT: We will have -- we will take that up, I
19 will reserve on Exhibit 3. It sounds like, in any event, there
20 is no objection to inquiring further about anything that Dr.
21 Tracy wrote if you want to continue questioning, but we will
22 take up the actual admissibility of which portions of Exhibit 3
23 outside of the jury's hearing.

24 MR. CURLEY: Very good.
25

1 BY MR. CURLEY:

2 Q. When the book came out --

3 MR. CURLEY: One second, your Honor.

4 BY MR. CURLEY:

5 Q. When the book came out and you knew about it, did you do
6 anything to stop it from being out there, change the content,
7 do anything like that?

8 A. I think this was in -- I think that the book came out in
9 October of 2015 and I reviewed -- I looked at a copy shortly
10 thereafter and I wasn't entirely impressed, frankly, I thought
11 it could have been much tighter, the ending.

12 I am not sure what you mean, what did I do.

13 Q. We are going to take up some matters on break, but there is
14 a section of the book that talks about what you do.

15 Did you do anything to stop that?

16 A. No.

17 Q. And the second edition, it talks all about your former
18 position with FAU, right?

19 A. I haven't looked at it in awhile, I believe so.

20 Q. And you had an opportunity to contribute to this, you
21 actually added to it, didn't you?

22 A. There was a chapter that I -- the equivalent, I think it
23 was originally a blog post concerning my experiences in
24 December 2015.

25 Q. And you talked about the fact that you were a professor at

1 FAU, taught media communications, conspiracy study and things
2 like that?

3 A. I wanted to tell my story because I was defamed in the
4 mainstream press. In 2015, there was a entirely different
5 story about my termination with respect to what took place, and
6 that was a place to tell it. I didn't have many.

7 Q. You didn't take out the references to FAU and your
8 professorship there?

9 A. They fired me, I was no longer working there.

10 Q. Okay. Did you feel like it was helpful for you to talk
11 about the fact that you were a professor at FAU --

12 MR. LEO: Objection, relevance.

13 THE COURT: Overruled.

14 BY MR. CURLEY:

15 Q. Did that give you more credibility --

16 A. Could you restate the question.

17 Q. Sure. When you tell people you are a professor at FAU in
18 media studies, and you talk about how the media has not
19 accurately reported Sandy Hook and other tragedies, do you feel
20 like the fact you are a professor at FAU gives you any more
21 credibility?

22 A. I think any lay person can run a blog and critique the
23 media and talk about current events, many lay people do, and do
24 a better job than me. There are no requirements around a blog,
25 it is a process discussing the day's events and so forth.

1 Q. There is no need to talk about the fact you are a professor
2 and work at FAU or any of those things when you write a blog?

3 A. It is not a scholarly discourse, a conclusive statement,
4 informal academic work, and exchange. It doesn't happen on a
5 blog. Likewise --

6 Q. Did you tell that to the FAU folks when they asked you why
7 you were referring to your affiliation with FAU, did you say,
8 look, I don't need to do that, none of that is important,
9 doesn't change anything?

10 A. At what time?

11 Q. Any time.

12 A. I'm not sure. I would have to have a specific instance.

13 Q. Okay.

14 MR. CURLEY: May I approach, your Honor?

15 THE COURT: Yes.

16 BY MR. CURLEY:

17 Q. I handed you what is marked Defendant's 157.

18 Do you recognize that?

19 A. Yes.

20 Q. All right, sir. Just so we have a frame of reference here,
21 what is the date of this article?

22 A. December 15th of 2015.

23 Q. All right. That is when you were writing to the university
24 saying you were on paternity leave and couldn't respond to
25 emails, right?

1 A. Yes.

2 Q. Okay.

3 MR. CURLEY: I would move 157 into evidence, your
4 Honor.

5 THE COURT: Any objection?

6 MR. LEO: No objection, your Honor.

7 THE COURT: Okay, 157 is admitted without objection.

8 (Whereupon Defense Exhibit 157 was marked for evidence.)

9 BY MR. CURLEY:

10 Q. You apparently had time to write this article, though,
11 didn't you?

12 A. The fact that I was being defamed and accused of criminal
13 harassment on December 10th by the Sun Sentinel and the Pozner
14 piece, I was concerned. I felt especially motivated to
15 respond.

16 Q. And you did. That is your piece here. Did you work hard
17 on that?

18 A. No.

19 Q. No?

20 A. Not to a great extent, I probably spent an hour, 90 minutes
21 on it.

22 Q. All right. And you issued this on the 15th of December,
23 2015, right?

24 A. Yes.

25 Q. Did you get it out in the morning or the evening?

1 A. I don't recall.

2 Q. You don't recall. Your response to FAU, that was at night,
3 as I recall, right?

4 A. Yes, 10:02 p.m.

5 Q. 10:02. You probably knocked this out before that, huh?

6 A. I don't know, probably.

7 Q. All right. And the article talking about defaming you,
8 that is the one you say was from the Pozners?

9 A. Yes.

10 Q. All right. This is Defendant's Exhibit 228. Do you
11 recognize that?

12 A. Yes.

13 Q. That is a letter you wrote to Lenny Pozner, isn't it?

14 A. I sent it to Mr. Pozner and the non-profit organization he
15 runs.

16 Q. Called Honor?

17 A. Yes.

18 Q. Okay.

19 MR. CURLEY: I move 228 into evidence.

20 MR. LEO: No objection.

21 THE COURT: 228 admitted without objection.

22 (Whereupon Defense Exhibit 228 was marked for evidence.)

23 MR. CURLEY: Can you pull that up, please.

24 BY MR. CURLEY:

25 Q. So we put this into context, Mr. Pozner was one of the

1 parents who lost his child at Sandy Hook, correct?

2 A. Purportedly, yes.

3 MR. LEO: Objection, that is not evidence.

4 THE COURT: Lay a foundation.

5 MR. CURLEY: May I proceed?

6 BY MR. CURLEY:

7 Q. This is a letter you wrote to him demanding proof, right?

8 A. Proof of --

9 Q. Look at page two, what you ask him for.

10 A. Do you want me to read it.

11 Q. Let the jury catch up.

12 All right, sir, these are the things you asked Mr. Pozner
13 to provide proof about, and you said his allegedly deceased
14 son, right?

15 A. No.

16 Q. No? Okay. Let's put --

17 A. It states it was an alleged photograph that appears in the
18 image in question referenced above.

19 Mr. Pozner filed a copyright infringement claim against my
20 use of an image that was well circulated in major media. It
21 subsequently appeared in 2014, in December, in an apparent
22 school massacre in Pakistan. The image, who we were told was
23 Noah Pozner, even the British Broadcasting System admitted this
24 appeared to be Pozner in a school massacre in Pakistan, which
25 leads one to call into question the veracity of the photograph

1 itself.

2 And this individual is contacting me and filing a copyright
3 infringement claim -- excuse me, not contacting me directly,
4 but filing a copyright infringement against my blog for the
5 fair use content of what has been in the media for commentary
6 and so forth.

7 I am asking for proof that this in fact is the image that
8 he --

9 Q. Do you see what is highlighted there?

10 A. Yes.

11 Q. What is that? What are you asking for?

12 A. Evidence, proof that he is the party that is related to the
13 individual in the picture itself, in the photograph.

14 Q. And he is asking you to stop using the photograph that he
15 says is his son, right?

16 A. Yes.

17 Q. You took issue with that?

18 A. I took issue with the entire nature of fair use. The
19 implications are considerable in terms of fair use.

20 Can I finish my response to the question?

21 Q. Sure.

22 A. The implications are considerable in terms of fair use and
23 the ability of citizens, individuals with blogs or otherwise,
24 to be able to use imagery that is circulated in the mainstream
25 media to critique anything, doesn't matter if it is the Sandy

1 Hook event or U.S. Government or anything else.

2 If people are able to lay copyright claim on intellectual
3 matter, this sets us very far back in terms of First Amendment
4 rights, in terms of our rights to critique other things,
5 institutions of power, whatever they may be, conflicts of
6 events. I think it is of tremendous significance that these
7 things be nailed down.

8 That is the reason for my letter to Mr. Pozner and his
9 organization who, by the way, you should be aware Mr. Pozner
10 was almost arrested for cyber stalking.

11 MR. CURLEY: All right. That is nonresponsive.

12 THE COURT: Okay, I am going to sustain the objection
13 as the answer has become beyond the scope of the pending
14 question.

15 MR. CURLEY: I am ready for a lunch break, your Honor.

16 THE COURT: All right. Ladies and gentlemen, we will
17 go into our lunch break now. It is 12:19. We'll return at
18 1:30. I remind the witness you remain under oath, you are not
19 to discuss the testimony with anyone.

20 Ladies and gentlemen, do not discuss with each other
21 or anyone else anything about the case. You are not to do any
22 research about the case, not to have any contact with anyone
23 associated with the case. Have a nice lunch, and we will see
24 you back at 1:30.

25 *(Thereupon, the jury leaves the courtroom.)*

1 *THE COURT:* Okay, our witness can step down from the
2 stand.

3 Let's resolve Exhibit 3, if we could.

4 *MR. CURLEY:* Do you know what we are talking about,
5 your Honor?

6 *THE COURT:* I have Exhibit 3 in front of me, so you
7 can tell me what page I am supposed to look at.

8 *MR. CURLEY:* It has a lot of Roman numerals.

9 *MR. FEICHT:* Seven pages in.

10 *THE COURT:* The one that starts with "content" at the
11 top? Which Roman numeral is it?

12 *MR. FEICHT:* XLVII.

13 *MR. CURLEY:* Called contributors.

14 *THE COURT:* One at a time. You probably should get
15 near a microphone.

16 It is beyond preface?

17 *MR. FEICHT:* Yes, past that, approximately 43 pages
18 in, I believe, within the document.

19 *THE COURT:* Okay. There is a note section here and
20 contributors. I have the contributor page, XI, and if we keep
21 going down, are we talking about the page XLVII?

22 *MR. FEICHT:* Correct, your Honor.

23 *THE COURT:* What is the proffer as to who wrote that
24 page?

25 *MR. FEICHT:* Dr. Tracy testified that he did not write

1 this portion, but that he was aware it went out in both the
2 first edition and second edition and he did not try to change
3 it. We are offering this as an adopted admission, not just a
4 statement by the party, but adopted admission. That is 8 -- I
5 am trying to flip to the rule.

6 *THE COURT:* Yes, I want the rule.

7 Is it 801(d)(2)(B), party manifested, adopted or
8 believed to be true.

9 *MR. FEICHT:* Correct.

10 *THE COURT:* You are seeking to get that in under that
11 rule, that page, XLVII.

12 *MR. FEICHT:* And his bio goes to the next page as
13 well.

14 *THE COURT:* XLVIII. Those two pages you want in under
15 that rule, right?

16 *MR. FEICHT:* Right, under both the adopted admission
17 exception from hearsay and as not hearsay because it is not
18 being offered for the truth of the matter asserted about
19 whether his dates of the background at FAU is true, but this is
20 in this book as a contributor.

21 *THE COURT:* What is the response on that?

22 *MR. LEO:* Your Honor, Plaintiff did not write this
23 book, there is no evidence that he sent this book himself to
24 anybody. There is testimony that there was a discussion about
25 the book and that he did -- he did not stop the book from being

1 circulated, but again, he did not write the section --

2 *THE COURT:* But there is no dispute that he was on
3 notice that that was included in the book that was published,
4 correct?

5 *MR. LEO:* Yes, Your Honor.

6 *THE COURT:* Okay, so I will allow those two pages that
7 I just indicated to come in. If you want to redo it again in
8 front of the jury, I will give a limiting instruction that that
9 portion of Exhibit 3 is not coming in for the truth of the
10 matter, but rather for simply the fact that Tracey was aware
11 that that was written about him in this book.

12 So those were two of the pages that were contested.

13 What else? Are we arguing about the table of contents
14 as well?

15 *MR. FEICHT:* We would like those admitted as well,
16 your Honor, for the same reasons.

17 *THE COURT:* What page are those?

18 *MR. FEICHT:* Page one, the cover page.

19 *THE COURT:* Page one is the --

20 *MR. FEICHT:* That is the cover.

21 *THE COURT:* The first page I have is two -- let me
22 find one. It goes from Roman numeral I, a blank page, at least
23 what I have on mine, and the first page I have is page II that
24 has nothing on it, and page III says prologue, Sandy Hook
25 Reality --

1 *MR. FEICHT:* We are not seeking anything about the
2 prologue.

3 Everything before that, at the beginning of the page,
4 not page one labeled at the body only. The first page of the
5 pdf, one, two, three, four, five -- the first five pages, the
6 cover, inside cover, copyright page showing when it was
7 published, the table of contents as well, for the same reasons
8 as the contributor section.

9 *THE COURT:* Everything else Dr. Tracy wrote?

10 *MR. FEICHT:* Everything else after that is one chapter
11 and the timeline.

12 *THE COURT:* Not for the truth of the matter, but Dr.
13 Tracey was aware this is what was contained in the book that
14 included portions of his post.

15 *MR. FEICHT:* His name and affiliation with FAU and it
16 was for sale on Amazon.com.

17 *THE COURT:* Does it say it was for sale on Amazon.com?

18 *MR. FEICHT:* Not here, but in the email admitted.

19 *THE COURT:* I am only talking about this right now.

20 So I will admit Exhibit 3. I would ask you all work
21 on the limiting instruction that you agree to that the Court
22 will read when you put it into evidence in front of the jury,
23 but with those rulings, I will admit the portions being
24 objected to as hearsay.

25 As to those portions Dr. Tracy didn't write, they are

1 not being offered for the truth of the matter, but for the fact
2 that Dr. Tracey was on notice that they were contained in the
3 book. If that is sufficient for both sides, you don't have to
4 write an instruction.

5 MR. LEO: Plaintiff is okay with that.

6 THE COURT: Defense is okay with that?

7 MR. FEICHT: Yes.

8 THE COURT: Okay. Just to be clear, the whole book,
9 the hard copy book was what exhibit from the Defense, the hard
10 copy itself?

11 MR. FEICHT: 38.

12 THE COURT: That is just being marked.

13 MR. FEICHT: Right.

14 THE COURT: What you are going to take out of Exhibit
15 3, and you will seek to admit it in front of the jury, all that
16 is going to be there is what we discussed. Posts, cover page,
17 table of contents and about the author, or about James Tracy,
18 the two pages that relate to him, that is what is our new
19 Exhibit 3.

20 MR. FEICHT: Yes.

21 THE COURT: Okay. We will see everybody back at 1:30.

22 *(Thereupon, a luncheon recess was taken.)*

23 THE COURT: Okay, we can bring our jurors in, and Dr.
24 Tracy can come back on the stand.

25 *(Thereupon, the jury returned to the courtroom).*

1 *THE COURT:* All right. Welcome back, everyone. We
2 will pick up where we left off with continuation of
3 cross-examination.

4 Counsel may resume.

5 *MR. CURLEY:* All right. Your Honor, at this point, I
6 move to admit the remaining portion of Exhibit 3 that we
7 discussed.

8 *THE COURT:* Yes. Okay, ladies and gentlemen, Exhibit
9 3 will be admitted. A matter was taken up outside the jury's
10 hearing that involved parts of Exhibit 3.

11 So, any part of Exhibit 3 that was not written by Dr.
12 Tracy, including, for example, the title of the book, table of
13 contents, there is a little biography about Dr. Tracy, he
14 didn't write any of those things. His posts are there, and
15 testimony about what he did write. What did he write is coming
16 in for the truth that he wrote it. The table of contents and
17 things of that nature are not coming in for the truth of the
18 matter, but rather simply to illustrate that Dr. Tracy had
19 notice of, for example, the title of the book, what was written
20 about in the biography, table of contents.

21 So that is how that exhibit is coming in.

22 *MR. CURLEY:* Thank you, your Honor. May I proceed?

23 *THE COURT:* Yes.

24 *BY MR. CURLEY:*

25 Q. Okay, Professor Tracy, you have in front of you Exhibit 3.

1 Do you recognize that to be the book Nobody Died at Sandy Hook,
2 your portions of it, it was a FEMA drill to promote gun
3 control?

4 A. I have the pages through the table of contents.

5 Q. Correct. Okay, sir, do you recognize that?

6 A. Yes.

7 Q. All right. Let's go through it real quickly here if we
8 could.

9 Page two, is this something that you wrote or was it
10 contributed by somebody else?

11 A. This was, I believe, compiled by the editors of the book.

12 Q. All right. And that is -- one of the editors is the
13 gentleman, Mr. Fetzer, that we talked about?

14 A. Yes, Dr. Fetzer.

15 Q. Dr. Fetzer is the guy that helped you write 165. Put that
16 up for a second, please. Is that right?

17 A. Yes.

18 Q. He wrote this and you edited it?

19 A. I modified it, yes.

20 Q. Okay. All right. Let's go back to the book, then, please.

21 If we could, I would like to go over to the first table of
22 contents right there. James Tracy, that is you, right, Medical
23 Examiner, More Questions Than Answers?

24 A. Yes.

25 Q. All right. And then on the next page there is an appendix

1 here. Does that include your timeline?

2 A. Yes, that is the timeline.

3 Q. Okay. And that is 110 pages by my count; is that right?

4 A. I think we counted 108 pages before lunch.

5 Q. Thank you, sir.

6 The next page, this is a page and it says James Tracy,
7 Ph.D., Associate Professor in the School of Communication and
8 Multimedia Studies at Florida Atlantic University, Boca Raton
9 faculty since 2002, and it talks about your schooling, and he
10 maintains memoryholeblog.com, and other events such as the
11 Boston bombing are popular and read.

12 All of this is accurate in the book?

13 A. Yes, at the time of the writing. At the time of writing,
14 since there are two or three editions of the book.

15 Q. Right. The other edition we looked at before, that is it,
16 the second edition?

17 A. Yes.

18 Q. All right. And this statement about your position at FAU
19 and credentials and things of that nature, is that something
20 that you put in the book or is that something that Mr. Fetzer
21 did or somebody else did on your behalf?

22 A. I don't recall. I am not sure whether the editors put that
23 together or whether I did.

24 Q. Okay. You never had it removed, though, right?

25 A. At which time?

1 Q. At any time. Like you sent a letter to the Pozners
2 demanding that they do things, did you send a letter to Mr.
3 Fetzner demanding that he remove --

4 A. I am not quite sure that is correct. I requested evidence
5 for the Pozners' copyright infringement claim which I alleged
6 was fraudulent, and that is where we left off before lunch.

7 Q. Did you do anything to have your name and credentials
8 removed from the Sandy Hook book?

9 A. In the fall of 2015?

10 Q. At any point of time.

11 A. Between the publication, October 22 or 20, whatever, and
12 the end of December of 2015, no, I did not.

13 Q. All right, sir.

14 A. And, of course, I was terminated by that time.

15 Q. And the final termination date was in January, correct?

16 A. Technically, yes.

17 Q. All right, sir.

18 In the next section of the book there is a chapter --
19 before we get there, there are a couple of things I want to ask
20 you about.

21 Do you remember the settlement agreement you looked at
22 yesterday?

23 A. Yes.

24 MR. CURLEY: Defendant's 19 -- may I approach, your
25 Honor?

1 THE COURT: Yes.

2 MR. CURLEY: I move 19 into evidence, it is a
3 duplicate of the Plaintiff's exhibit.

4 THE COURT: Any objection?

5 MR. LEO: No objection.

6 THE COURT: Admitted without objection.

7 (Whereupon Defense Exhibit 19 was marked for evidence.)

8 BY MR. CURLEY:

9 Q. All right. Professor Tracy, do you remember this?

10 A. Yes.

11 Q. You see your signature there. That is your signature?

12 A. Yes.

13 Q. Mr. Broadfield was your union representative, right?

14 A. At the time, yes.

15 Q. When you signed this, did you agree to abide by its terms?

16 A. I did.

17 Q. All right, sir. It has some conditions and things of that
18 nature. The document that we just looked at in the book, do
19 you think it complies with the terms of the provisions of your
20 agreement here?

21 Let me see if I can make this easier for you.

22 Did you ask anybody at the school if it would be okay for
23 you to publish the book?

24 A. I was on paternity leave in 2015.

25 Q. You didn't ask?

1 A. I had my hands full to try to get clarification on the
2 activities policy, as covered at length yesterday.

3 Q. How about the settlement agreement, were you clear on that?

4 A. I believe so, yes.

5 Q. So, when the book came out and had all of this information
6 about your affiliation with FAU, you knew that shouldn't be
7 there, right?

8 A. Perhaps not if FAU is concerned with regard to the subject
9 matter and content matter of the book, which appears they were.

10 Q. This agreement here seems to be about you representing you
11 are speaking on behalf of the school, doesn't it?

12 A. Correct.

13 Q. So, do you think FAU has a right to ask you to honor your
14 agreement or that is too much?

15 A. No, it is not too much. I was fired six weeks after the
16 book's publication.

17 Q. Excuse me?

18 A. I was fired roughly six weeks after the book's publication
19 in October of 2015.

20 Q. Right. During that period of time you were being asked to
21 answer questions about what you were doing in your outside
22 activities so people could evaluate conflicts of interest, and
23 things like that?

24 A. Correct.

25 Q. During that six-week period of time, did you tell them that

1 you were publishing a book?

2 A. I was continuing to request clarification for the policy,
3 which I never received.

4 Q. Okay. The settlement agreement, we are clear on that,
5 right, you can't use FAU's name, say you're a professor for FAU
6 and rely on your credentials?

7 A. Okay, yes.

8 Q. Okay. So, we have the book which seems to clearly say --
9 if you could pull that up, please. This seems to clearly say
10 what your affiliation is with the school, what you do for the
11 school. In fact, it seems to be self promotion using the
12 school as a platform.

13 MR. LEO: Objection, counsel is testifying.

14 BY MR. CURLEY:

15 Q. Did I get that right?

16 THE COURT: I'll sustain the objection.

17 BY MR. CURLEY:

18 Q. This seems to me like you are trying to use the affiliation
19 of the school to add credibility to your work.

20 MR. LEO: Objection, counsel is testifying.

21 BY MR. CURLEY:

22 Q. Is that right?

23 THE COURT: Just a moment. Rephrase the question and
24 not make it personal as to how it looks to you, but ask the
25 question.

1 BY MR. CURLEY:

2 Q. Were you attempting to engage in some type of self
3 promotion here?

4 A. No.

5 Q. Were you attempting to bolster the credibility of your work
6 by allowing them to include this information about your
7 services as an associate professor?

8 A. They may want to have bolstered the credibility of the work
9 for their own purposes since they were editors of the book and
10 the foremost recipients of the funds for the sale of the book,
11 but I did not.

12 Q. What did you do to stop them?

13 A. Once again, it was a short period of time, between mid to
14 late October, 2015 and December 16th of 2015, when I was
15 terminated.

16 I was working as hard as I could to attempt to address my
17 confusion concerning the outside policy that was shared with
18 most of the other faculty of the university.

19 Q. I am sorry, was there something in there where you said you
20 tried to stop them using your references of the affiliations
21 with the school?

22 A. In a way, yes, I requested clarification.

23 Q. Did you request clarification of the book?

24 A. I was requesting clarification of a number of things.

25 Q. What about the book?

1 A. Specifically, no.

2 Q. You didn't mention the book, ever?

3 A. Did I mention it? I was not attempting to conceal it. It
4 is readily available there on the internet.

5 Q. Okay. Can you put up Defendant's Exhibit 1, page -- let's
6 start with page 11.

7 This is the collective bargaining agreement you signed,
8 sir. I would like to focus your attention on Section D there.

9 Do you see where it talks about matters of public interest,
10 the fact that any member shall make clear when they represent
11 personal opinions and official university positions?

12 Is there anything in this book, in your statement about
13 your position with the university, where you disclaim any --
14 that this has anything to do with the school?

15 A. No, but these are blog posts from the memoryholeblog.com
16 site. There is a disclaimer there, and the disclaimer was
17 there from early 2012.

18 Q. I couldn't find a disclaimer in the book.

19 MR. LEO: Objection, counsel is testifying.

20 THE COURT: Sustained. Is there a question?

21 BY MR. CURLEY:

22 Q. Is the disclaimer you just mentioned in the book?

23 A. I don't believe it is.

24 Q. Okay, look at 19.7, which is page 55 of 100. 19.7, can you
25 highlight that, please.

1 It reads: No university affiliation as specified in
2 5.3(d), employee engaging in outside activity, shall indicate
3 he or she is an institutional representative unless
4 specifically authorized as such.

5 You weren't authorized to publish the book, right?

6 A. I didn't publish the book.

7 Q. You weren't authorized to allow the sections that you
8 included in the book to be used, right?

9 MR. LEO: Objection, mischaracterization.

10 THE COURT: Overruled.

11 THE WITNESS: These were articles from the -- my
12 personal blog.

13 BY MR. CURLEY:

14 Q. It says: "Employee shall take reasonable precautions to
15 ensure outside employer or other recipient of the services
16 understands that the employee is engaging in activity as a
17 private citizen, not an agent or spokesperson for the
18 university."

19 What steps did you take with Mr. Fetzer and the other
20 fellow to ensure that it was clear?

21 A. I would have taken those precautions if I was notified by
22 the university or I was fired. The university found out about
23 this after my notice of intent to terminate. They were looking
24 for things to justify the termination, and this is one of the
25 things they found.

1 Q. You blame the university for publication of the book
2 without telling them, that is their fault?

3 A. No. No.

4 Q. Okay. So, for the six weeks that you were there, any
5 efforts taken in compliance with the collective bargaining
6 agreement to make sure everybody understands this is not
7 associated with FAU?

8 A. At the time, once again, I was dealing with other matters,
9 the notice of discipline and so forth on November 10, and I
10 continued to attempt to get clarification of the policy that
11 was being used to eventually terminate me.

12 Q. You were too busy to deal with issues like this; is that
13 what you are saying?

14 A. I was too busy attempting to defend myself.

15 Q. All right.

16 MR. CURLEY: Your Honor --

17 BY MR. CURLEY:

18 Q. Was there a podcast that you did with Mr. Fetzer in
19 November of 2015, where you talked about the book?

20 A. There may have been, yes.

21 MR. CURLEY: At this time, your Honor, I would like to
22 play the portion of the podcast that we discussed.

23 THE COURT: What exhibit is that?

24 MR. CURLEY: 225.

25 THE COURT: You were able to make modifications to it

1 consistent with the Court's ruling?

2 MR. CURLEY: We were, your Honor.

3 THE COURT: 225. We'll rename it because it is
4 excerpts of it.

5 Is there any objection from the Plaintiff as to the
6 noted excerpts?

7 MR. LEO: These are the excerpts we addressed
8 previously?

9 THE COURT: Yes.

10 MR. LEO: Aside from the previous objections, the
11 standing objection, no other objections.

12 THE COURT: The allowed portions of 225 may be played.
13 How are you going to do that? Are you going to play it?

14 MR. CURLEY: It is easiest to play it and I have a few
15 questions following it.

16 (Thereupon, excerpts of the podcast were played.)

17 MR. CURLEY: That is it.

18 BY MR. CURLEY:

19 Q. The date I have for the podcast is November 10, 2015. Does
20 that sound about right?

21 A. I guess so.

22 Q. All right, sir. That is right in the middle of the six
23 weeks you were talking about, huh?

24 A. Yes.

25 Q. And that was your voice we heard, right?

1 A. Yes.

2 Q. This podcast, that is one you did from the school or did
3 you do that someplace else?

4 A. I don't recall.

5 Q. And what I heard you say in the podcast, and I would like
6 you to tell me if I heard it correctly, "Jim is also a
7 well-established research of deep events, Government
8 conspiracies." That is Mr. Fetzner you are talking about?

9 A. Yes.

10 Q. All right. You said -- I want to make sure I am quoting
11 you correctly -- "it was a FEMA drill. That is a declaration
12 as well as the title of a brand new book filled with copious
13 research by mainly academics, including myself."

14 Are those your words?

15 A. They are.

16 Q. Copious research. We talked about research and you not
17 engaging in research outside of the university before. Where
18 does copious research fall in?

19 A. Once again, this is not academic research. I wish that all
20 of us could actually read the entire book to understand, but I
21 think we are relying primarily on impression.

22 Q. What we heard there was a podcast that seemed to be
23 something, my words, not yours, marketing the book. How would
24 you describe it?

25 A. I don't think it was marketing.

1 Q. What was it?

2 A. Certainly promotion of the title. I don't think there is
3 anything wrong with that.

4 I have various authors on, people who have written books,
5 on the podcast from its beginning and they have something
6 interesting to say. That is why I have them on. Not because I
7 have any sort of personal interest in marketing the book. I
8 think it might only be fair to listen to a number of
9 introductions to other authors, guests of the program, because
10 they are fairly similar in terms of introducing and discussing
11 their most recent works or work, whatever they have done.

12 That is usually what is the topic for discussion.

13 Q. All right, sir. Let's go back to the book, and we will
14 finish that.

15 Go to page 19, Professor Tracy's article, Medical Examiner.

16 Do you recognize this, sir?

17 A. I see it on the monitor, I don't have a paper copy of it.
18 Yes, I see it on the monitor.

19 Q. Is this your contribution?

20 A. Yes.

21 Q. All right. And this is -- I think you said earlier it was
22 a blog post?

23 A. Yes, it is unedited. It is what was lifted off the blog by
24 the editors.

25 Q. Did you review it?

1 A. At the time, this is three years ago, I believe I did.

2 Q. Was it in the next book, the second edition or the third
3 edition?

4 A. I am not sure, I believe so.

5 Q. Okay.

6 MR. CURLEY: May I approach, your Honor?

7 THE COURT: Yes.

8 BY MR. CURLEY:

9 Q. Why don't you refresh your memory.

10 A. Yes, it was also in the second edition, in fact same page
11 number.

12 Q. When it went into the second edition, did you look it over
13 to make sure your edits, whatever you thought were necessary,
14 got done?

15 A. I believe that I contributed an additional essay to this
16 second volume. I don't believe that I checked the essays were
17 existing in there already.

18 Q. Okay. Now we get to the timeline, that is page 245 of the
19 book.

20 Do you recognize that?

21 A. Yes.

22 Q. Okay.

23 I think you said this took approximately 18 months. Does
24 that sound about right?

25 A. Well, 18 months of working five or ten minutes every day or

1 ever other day to compile synopses of the news articles that in
2 many cases were cut and pasted off the first two paragraphs of
3 the news article and edited, and there is a link. If anyone
4 wants to look through the timeline they will see that is how it
5 is assembled, the timeline with the articles.

6 The one that is online is interactive in the sense of hyper
7 links, one could click on and to go the article of a
8 publication.

9 Q. You were working on this for 18 months, and your testimony
10 is a couple of minutes a day?

11 A. It was not a great deal of time, depended on the volume of
12 the news articles that would appear concerning the Sandy Hook
13 event that seemed to be relevant for the timeline or fitted to
14 be included if they were significant. That would depend on my
15 discretion.

16 Q. Okay. And again, no disclosure of this work either, right?

17 A. The Sandy Hook second edition?

18 Q. No, the timeline, 18 months of work you put into this.

19 A. Eighteen months of my personal time on my personal blog.

20 Q. Uh-hum. No disclosure, right?

21 A. No.

22 Q. All right. We talked earlier about compensation.

23 When you filed your Federal Court complaint, did you look
24 it over?

25 A. Which one?

1 Q. Well, I am looking at the second amended complaint. That
2 is what I am looking at now, Exhibit 210-A.

3 I assume you looked at them all, but you signed --

4 A. I believe so, yes. The second one, yes.

5 Q. That is your signature attesting to the accuracy?

6 A. Yes.

7 Q. How many times in your complaint do you think it says you
8 didn't receive any compensation for outside activities?

9 A. I don't know.

10 Q. In your sworn complaint?

11 A. It has been awhile since I read the complaint.

12 Q. Okay. I took the liberty of highlighting everywhere in the
13 complaint where it says uncompensated, and I counted 21 times.

14 MR. LEO: Objection, counsel is testifying.

15 THE COURT: Sustained.

16 BY MR. CURLEY:

17 Q. All right. Let me approach and we can go through it
18 together.

19 A. Okay.

20 MR. CURLEY: That is the second amended complaint,
21 your Honor, 210-A.

22 THE COURT: Okay, I will have that marked.

23 BY MR. CURLEY:

24 Q. Page two, paragraph two, protected uncompensated speech,
25 are you with me?

1 A. Yes.

2 Q. Paragraph 141, uncompensated.

3 MR. LEO: Objection, relevance and cumulative.

4 THE COURT: Overruled.

5 BY MR. CURLEY:

6 Q. How about 46, uncompensated?

7 A. Are you talking about paragraph 46?

8 Q. Yes. Is the highlighted blue word uncompensated?

9 A. Yes.

10 Q. Paragraph 61, 62, that is page 17, uncompensated,
11 uncompensated. Do you see it?

12 A. Yes, I do.

13 Q. All right. We could keep going. We have better things to
14 do with our time, but it looks like about 21 to me. Do you
15 want to count them up?

16 A. You are referring -- uncompensated, you are referring to it
17 in an accusatory fashion, with the PayPal donation button in
18 mind; is that correct? You are not talking about a salary or
19 anything of the like.

20 Q. I am talking about money that you received.

21 A. That is a joke.

22 Q. That is a joke?

23 A. Pardon?

24 Q. That is a joke?

25 A. No.

1 MR. LEO: Objection, argumentative.

2 THE COURT: Sustained.

3 BY MR. CURLEY:

4 Q. That is what I am talking about, money that you received
5 for research on your memoryhole site, we went through it. Did
6 you or didn't you?

7 A. I think I have already stated that I recognize this states
8 uncompensated in the complaint.

9 Q. Okay.

10 A. And I have already said, yes, funds were received for
11 maintenance of the site, they did not go into my checking
12 account, they didn't pay my bills, mortgage, children's medical
13 bills or anything of the like. They were used for upkeep of
14 the blog, not personal expenses. That seems to be lost in
15 this.

16 Q. Well, you said 21 times, and your statement is I, James
17 Tracy, swear under the penalty of perjury under the laws of the
18 United States, etc. etc., what is in here is accurate.

19 Why didn't you just write, I received money, it was paltry
20 sums, didn't matter, insignificant things of that nature? Why
21 is uncompensated an important word, 21 times?

22 MR. LEO: Objection.

23 THE COURT: Overruled.

24 THE WITNESS: When we are talking about compensation,
25 I have in mind a salary or equivalent.

1 That is what is suggested in Florida Statute 112, Part
2 III, for anyone to review. The law is right there, plain and
3 clear. With things such as conflict of interest, they are
4 talking about compensation, not paltry contributions on a blog.

5 Q. So we looked at Exhibit 22 before when you wrote money
6 changes hands and you have to disclose it. That doesn't count?

7 A. That was, I believe, an email that was sent to colleagues
8 who were in the UFF, in the faculty union, who were officers at
9 the time.

10 Q. Union members?

11 A. Yes. I was approached by a media outlet that wanted to
12 have me write pieces for them, and they wanted to compensate
13 me, so I was concerned. This is in the fall of 2015; I was
14 concerned with regard to the outside activities policy and I
15 wanted to be able to follow the rule of the law and I inquired
16 their understanding of the policy.

17 Q. Okay.

18 A. That is not what you are highlighting, though, from that
19 particular email.

20 Q. No, I didn't. I highlighted your statement that since
21 money was changing hands --

22 A. We could read the whole email to clarify that.

23 Q. It is in evidence, the jury will read it. They get the
24 full documents, they will have it all.

25 A. Yes.

1 MR. CURLEY: Let's pull up Exhibit 111. May I
2 approach, your Honor?

3 THE COURT: Yes.

4 BY MR. CURLEY:

5 Q. Do you recognize your email?

6 A. Yes.

7 Q. That's one of the emails you talk about with your union
8 members, right?

9 A. May I have a moment to read it? It is rather lengthy.

10 Q. You wrote it, but go ahead.

11 MR. CURLEY: Can I move it into evidence, your Honor?
12 That way we can all read it together.

13 MR. LEO: I object to counsel testifying.

14 THE COURT: Any objection to it coming into evidence,
15 111?

16 MR. LEO: We have no objection to the exhibit. I do
17 have objection to counsel testifying. He said, you wrote it.

18 THE COURT: Okay, first of all, it is admitted without
19 objection. And I don't know whether "you wrote it" was
20 intended as a question or comment, but all remarks to Dr. Tracy
21 should be posed as questions.

22 (Whereupon Defense Exhibit 111 was marked for
23 evidence.)

24 BY MR. CURLEY:

25 Q. Let me know when you are ready, sir.

1 A. Okay.

2 Q. All right. Let me see if I can focus your attention on the
3 part that would interest me.

4 It says down there, "I don't know" -- can you highlight
5 that section right there, please. "I don't know if the union
6 will support the case to arbitration because of the term
7 specific description of insubordination -- my actions -- it is
8 cut and dry." What did you mean by that?

9 A. I was confused, I was uncertain. I just received a Notice
10 of Discipline and I was seeking assistance from the union.

11 Q. Okay.

12 A. I wanted to have a grievance filed.

13 Q. Right. 217 --

14 A. And it is also common knowledge with the United Faculty of
15 Florida that they will not take on a grievance through to
16 arbitration if it is something that may not been winable, that
17 is why I mention that.

18 Q. Right, okay.

19 MR. CURLEY: May I approach, your Honor?

20 THE COURT: Yes.

21 BY MR. CURLEY:

22 Q. I hand you 217-M. Do you recognize that?

23 THE COURT: Let me ask, with 111, did you seek to move
24 that in?

25 MR. CURLEY: I do, your Honor.

1 *THE COURT:* No, it is in. Okay. I didn't make a note
2 of it.

3 *MR. CURLEY:* I appreciate that.

4 *THE COURT:* Okay, so this is 217-M.

5 *BY MR. CURLEY:*

6 Q. All right, sir, do you recognize that?

7 A. Yes.

8 Q. And this contains emails that you wrote; is that correct?

9 *MR. CURLEY:* Your Honor, I move 217-M into evidence.

10 *THE COURT:* Any objection?

11 *MR. LEO:* No objection, your Honor.

12 *THE COURT:* Admitted without objection.

13 (Whereupon Defense Exhibit 217-M was marked for evidence.)

14 *BY MR. CURLEY:*

15 Q. All right, sir, let me focus your attention on the middle
16 email, dated December 29, 2015.

17 *MR. LEO:* Your Honor, could we have an instruction
18 concerning the use of communications from Plaintiff's union
19 attorney?

20 *THE COURT:* Insofar as not the truth of the matter?

21 *MR. LEO:* Yes.

22 *THE COURT:* So, only those portions of the exhibit
23 that Dr. Tracy wrote would be introduced for the truth of the
24 matter, what he wrote. Anything else that appears in the email
25 written by somebody else is not introduced for the truth of

1 what is contained in those communications.

2 *MR. CURLEY:* May I proceed, your Honor?

3 *THE COURT:* Yes.

4 *BY MR. CURLEY:*

5 *Q.* Thank you.

6 The middle email there, that is something you wrote, right?

7 *A.* Yes.

8 *Q.* Okay. In the second paragraph -- well, we are going to
9 start, this is where you are talking about equipment, and you
10 write "I've used these out of convenience to answer emails and
11 browse the web which is likely a technical violation as well".
12 Then you go on to say --

13 *A.* These are laptops -- it is important to clarify and read
14 the entire two paragraphs. It is being pulled out of context.

15 *Q.* Okay, how about we will start -- everybody can see it.

16 *A.* Okay.

17 *Q.* All right?

18 *A.* Yes.

19 *Q.* It says, "Because I teach journalism and media studies I
20 found doing the program reinforcement to my formal professional
21 endeavors."

22 Is this the inside research or outside research here? Now
23 we have formal professional endeavors. What is that?

24 *A.* That would be academic work, that would be teaching and
25 academic research, and so forth.

1 Q. Okay.

2 A. I find speaking and engaging with intellectuals to be
3 stimulating.

4 Q. All right, sir. Anything wrong with that?

5 A. Not in my opinion.

6 Q. So, let's continue on. As I was able to interview --
7 getting their insights on what they do.

8 Are you talking about the Real Politik blog or something
9 else?

10 A. This is the podcast.

11 Q. Yes, I thought that was outside activity.

12 A. It is.

13 Q. But you told me that you found that good for your
14 professional, highlight on the word professional of course,
15 endeavors.

16 A. I said I appreciate speaking to intellectuals on and off
17 the job.

18 Q. There is no correlation, you use professional endeavors
19 with the rest of it, that doesn't relate to your work at the
20 school?

21 A. Formal --

22 Q. Your words, not mine.

23 A. In fact it is professorial.

24 Q. Okay.

25 A. It says professorial endeavors.

1 Q. Thank you. Professorial endeavors?

2 A. Yes.

3 Q. Same point, okay.

4 Getting their insights on what they do because some of the
5 content was controversial, and in light of my personal
6 experience in the press and controversial coverage of me since
7 early 2013, I felt uneasy about approaching my chair to ask
8 that the project be aged as part of my assignment."

9 Do you see that?

10 A. Yes.

11 Q. So you concealed it from your chair?

12 A. I did not think it would be welcome.

13 Q. Is that another exclusion that allows you to not fill out
14 the forms?

15 A. I just did it on my own time, I did not ask for credit for
16 the assignment because the controversial content made the
17 administrators uneasy, they wanted to censor me. I did not
18 bring it to their attention, and that was my choice.

19 Q. How would you know that until you ask them? You didn't go
20 to them?

21 A. I am in the academic culture at FAU and the whole
22 controversy in the press changed things, and so I just opted to
23 do these things on my own.

24 Q. All right.

25 A. On my personal time.

1 Q. Even though they were professorial endeavors?

2 A. No. You are misreading it.

3 It says because I'm in journalism and media studies I found
4 doing the program a reinforcement to my formal professorial
5 endeavors, in other words speaking and engaging with
6 individuals involved in the media or other intellectual
7 activity I find to be stimulating.

8 How thick of a concrete wall does there have to be between
9 one's academia and personal life?

10 Q. We are talking about disclosures.

11 A. Most academics will tell you there is a tremendous gray
12 area between what they do professionally and what they do
13 personally, only sometimes there is a great deal of controversy
14 that upsets certain employers, and they seek to censor their
15 employees.

16 Q. Okay.

17 MR. CURLEY: May I approach, your Honor?

18 THE COURT: Yes.

19 MR. LEO: Your Honor, we object to Thomas Johnson's
20 statements as hearsay.

21 THE COURT: Response.

22 MR. FEICHT: Your Honor, Mr. Johnson was Professor
23 Tracy's --

24 MR. LEO: Your Honor, this will be more appropriate
25 for sidebar given the nature of the communications at issue,

1 particularly the first page.

2 THE COURT: Yes, I understand.

3 MR. LEO: Also unduly prejudicial.

4 THE COURT: All right. Just a moment.

5 We will take this matter up, I will let the jurors
6 just take a mini break right now. Rather than turn the noise
7 on and make you sit there, we will give you a little break so I
8 can take up the legal issue with the lawyers. Make yourself
9 comfortable and stretch and I will call you back in.

10 *(Thereupon, the jury leaves the courtroom.)*

11 THE COURT: Okay. All right. So, we are talking
12 about Exhibit 216-A, feel free to be seated, and it has to do
13 with Thomas Johnson, the attorney for Dr. Tracy, correct?

14 MR. LEO: Yes.

15 THE COURT: That is who Thomas Johnson is?

16 MR. LEO: Yes, former union appointed attorney.

17 THE COURT: I know this issue came up, and I will
18 address it generally, this may assist you with this exhibit and
19 some other exhibits.

20 I do know on November 28th the Defendant filed a
21 motion to admit testimony, again it has to do more with the
22 deposition testimony of Johnson which the Defendant was
23 attempting to use in his case.

24 MR. CURLEY: That is right.

25 THE COURT: Defendant filed a motion to admit the

1 testimony made by Plaintiff's agent. On November 29th the
2 Court ordered Plaintiff to respond and Plaintiff, to date, has
3 not responded to the motion, but in reviewing the Defendant's
4 motion, again, I know it is not exactly on point with this
5 exhibit, but it will resolve some of the issues as relates to
6 Thomas Johnson.

7 The Court could see no reason why not to grant
8 Defendant's motion that was filed to admit the testimony made
9 by Plaintiff's agent insofar as Defendant was seeking in its
10 motion to admit the deposition testimony of Plaintiff's former
11 attorney, Thomas Johnson.

12 That testimony is not privileged, which should come as
13 no surprise to Plaintiff as this issue was litigated before
14 Magistrate Hopkins months prior to trial, with Judge Hopkins
15 ruling in favor of the Defendant -- and Plaintiff's production
16 of his case file with Mr. Johnson.

17 Stated succinctly, the Plaintiff put the testimony of
18 Mr. Johnson at issue when he alleged that Mr. Johnson was part
19 of a conspiracy against him. For this reason, together with
20 the fact that the Plaintiff used communications with Mr.
21 Johnson in support of the claims, Mr. Johnson's testimony is
22 not privileged.

23 That is International -- I don't know -- TEL, period,
24 NTEL, period, Corp. v United Tel., it might stand for
25 telephone, CO of Florida, 60 F.R.D. 185, Middle District of

1 Florida. A party may not -- damage and communications while
2 disclosing other second communications because they are
3 self-serving, similarly, if the -- the production of all of the
4 correspondence could be demanded.

5 Mr. Johnson's testimony is also relevant. The Court
6 has ruled that evidence of Plaintiff's confusion or lack of
7 confusion about FAU policies is relevant together with the
8 advice he received in connection with that decision.

9 So, with respect to Mr. Johnson's deposition, the
10 Court is going to permit it -- it is permitted by Federal Rule
11 of Civil Procedure 32, insofar as Rule 32(a)(1) allows an agent
12 represented at the deposition, and is allowed by Rule 32(a)(4).
13 Rule 32(a)(4)(B) permits a deposition to be used if the
14 deponent is more than a hundred miles from the place of trial.
15 The Defendant represents that all of the criteria is met and
16 the Court sees no reason to conclude otherwise. At least on
17 that issue of the deposition, the federal rules would permit
18 Defendant to use Mr. Johnson's deposition.

19 Mr. Johnson's emails, one of which we are talking
20 about now, 216-A, are admissible as well.

21 Federal Rule of Evidence 801 provides a statement by a
22 person authorized by a party making a statement concerning the
23 subject is not hearsay. Statements made by attorneys in a
24 representational capacity, Hanson versus Waller, 888 F.2d 806,
25 814, Eleventh Circuit, 1989.

1 Now, if there are other types of objections that the
2 Defense has -- Plaintiff has, the Court will hear that, but
3 that is the general -- and also the Court is willing to
4 entertain a limiting instruction if the Plaintiff is worried
5 about the jury assigning an unfair weight.

6 *MR. LEO:* There are a few objections here. We
7 objected to everything with respect to this exhibit being used
8 at trial. It is hearsay. Johnson is offering his conclusion
9 as to whether or not he was insubordinate, and this first page,
10 this is TJ8, this is solely Johnson's statement. There is no
11 statement from Professor Tracy to him.

12 If you look at page TJ69, this is a discussion
13 regarding a settlement offer, and this should be excluded under
14 408 because it is an offer of compromise, and he is weighing
15 his options with his attorney. This is prejudicial, there is
16 no probative value.

17 They certainly can ask Professor Tracy about his
18 communications with Mr. Johnson without having to introduce
19 Johnson's hearsay statement and certainly this discussion about
20 a settlement offer made by the university shortly after they
21 fired him.

22 *THE COURT:* Is he speaking in this email as an agent
23 of Dr. Tracy?

24 *MR. BENZION:* Matthew Benzion for the Plaintiff. He
25 is speaking to the Plaintiff, he is not speaking to a third

1 party, he is not speaking in his representative capacity for
2 the Plaintiff. He and the Plaintiff are having a conversation,
3 and the Plaintiff's communications are not included in the
4 conversation.

5 So, I think it would only be fair, just as the
6 Plaintiff is required to prepare a memo on 801(d)(2)(D) and
7 explain how that exception applies, perhaps the Defendant
8 should have to make sure to prove to the Court in a memo that
9 when speaking with the person whose interests you are allegedly
10 representing, that in this scenario, the 801 exception that the
11 Court is contemplating applies because they are not made to a
12 third party in an agent capacity, they are to the Plaintiff
13 himself.

14 And this invades -- before I move to the last point to
15 add to the settlement discussion argument on TJ69, there is
16 language "the prospect of settling for my salary through spring
17 is not attractive." They are clearly discussing settlement in
18 the emails.

19 And the last point I was going to make, your Honor,
20 this email on the front page invades the province of the jury.
21 This is an opinion about insubordination. The Defendant is
22 trying to prove that the Plaintiff is insubordinate and the
23 Plaintiff has a right in trying to prove he was not
24 insubordinate. This is asking the jury to adopt Johnson's
25 opinion that was ill informed at this time which, I will add,

1 is evidenced by Johnson in his deposition.

2 MR. FEICHT: Your Honor, it is irrelevant that
3 Plaintiff is not the one sending these communications under
4 801(d)(2), subsection C, and subsection D. Most particularly,
5 subsection D: Was made by the party's agent on a matter and
6 scope of that relationship.

7 Professor Tracy said he was following the advice of
8 his attorney. He said he was confused and now he is saying he
9 followed the advice of his attorney.

10 It is evidence to contradict whether he was confused,
11 not being offered for the truth. It is being offered to show
12 that Professor Tracey was on notice of his agent's opinion of
13 the matter at issue that is in this case.

14 It is not a confidential settlement communication,
15 that is waived by virtue of voluntary production of both the
16 email and Mr. Johnson and the entire case law.

17 Additionally, the Plaintiff testified as a result that
18 he was trying to resolve this. He testified just yesterday
19 that he was trying to resolve this, and this shows why he
20 wasn't able to resolve this, his desire to publish a book about
21 this. It is not about his confusion, it is about the right to
22 publish a book about the entire dispute.

23 There is so much probative value and the Plaintiff
24 opened the door to this by virtue of the professor's testimony,
25 of direct testimony of his reliance on his attorney and failure

1 to file a grievance as well.

2 MR. LEO: May I respond?

3 THE COURT: Why didn't you file a memo? This is what
4 I asked you to file a memo on. The general issue -- this
5 document is different.

6 MR. BENZION: The memo that your Honor asked us to
7 prepare is related to the notice prepared by Defendant --
8 former Defendant Heather Coltman regarding the 801(d)(2)(D)
9 exception, and counsel has every intention of preparing the
10 memo which we were asked to prepare 24 hours before attempting
11 to use the memo, and submit it in -- and submit it into
12 evidence. We don't intend to do it until next week, we are
13 applying our resources to the appropriate needs at this time,
14 and the memo will be submitted to the Court in advance of when
15 we planned to use it.

16 THE COURT: I think we required two filings.

17 I will let you be heard briefly on the response to his
18 point. Very briefly.

19 MR. BENZION: Yes. Respectfully, I believe Mr.
20 Feicht missed the point. It is not statements that --
21 statements made by Professor Tracy, they are made to Tracy, and
22 they are his opinion. They are not Tracy's statements being
23 adopted -- or Mr. Johnson's statements being adopted by Tracy
24 and related to somebody else, it is Johnson's opinion whether
25 they should be taken -- considering this settlement offer and

1 whether he is insubordinate and invades the province of the
2 jury.

3 *THE COURT:* I have to see if there is an element of
4 801(d)(2)(D) that requires it to be made to a third party.

5 I do know that so long as the agent's or servant's
6 statement is made during the existence and employment of the
7 relationship it is admissible against the principal. There is
8 case law on that, let me take a closer look at that. I hear
9 you are raising 408 as well.

10 *MR. BENZION:* And 403.

11 *MR. FEICHT:* As to 403, there is value that he
12 followed the advice of his counsel and despite that advice, he
13 was still confused. That is why he was insubordinate. That is
14 within the scope of the agency. Mr. Johnson's only involvement
15 in this case is representing the Plaintiff as the union
16 attorney. Unlike Dean Coltman, he had the precedence laid.
17 This is within the scope of the agency.

18 *THE COURT:* We will take a brief break so I can look
19 at that.

20 *MR. CURLEY:* Thank you.

21 *THE COURT:* I remind you, Professor Tracy, that you
22 are still under oath.

23 We will let this be the mid-afternoon break.

24 *MR. CURLEY:* All right.

25 *(Thereupon, a short recess was taken.)*

1 (Thereupon, trial reconvened after recess.)

2 *THE COURT:* All right. So, here is what we are going
3 to do with this 216-A, which is the email from -- well, it has
4 a series of emails, email train between Dr. Tracy and Thomas
5 Johnson.

6 I have already made my ruling with respect to the
7 waiver issue as relates to attorney/client privilege and how
8 this is put at issue, so that obviously applies to this
9 exhibit, even though I was speaking of it in the context of the
10 deposition that the Defendant will seek to have parts of it
11 read or in total read, so I have addressed that issue.

12 With respect to this email, there are a couple of
13 issues that were raised.

14 First of all, any statement in the email, any part of
15 the email chain that is by the Plaintiff is admissible under
16 801(d)(2)(D), and there was a portion of it that Jim Tracy had
17 written in the email.

18 As to the Rule 408 objection which was relating to
19 Bate stamp number 69 where Johnson says -- no, where Tracy says
20 the prospect of settling for my salary through spring is not
21 attractive, although I am sure they want this behind them
22 before the term begins, I imagine I will also have to sign a
23 release when I can -- where I cannot discuss the issue. In the
24 long term, that is not fruitful for me, particularly if I want
25 to write about this as a book or equivalent.

1 Question, was a settlement offer made by FAU to the
2 Plaintiff to settle this case with salary through the end of
3 the term or is this a hypothetical situation?

4 MR. LEO: Yes, your Honor, there was an offer made for
5 salary to the end of the term conveyed by Thomas Johnson to the
6 Plaintiff.

7 THE COURT: The Plaintiff is saying the Plaintiff was
8 made a settlement offer by the Defendant. What does the
9 Defendant say about that?

10 MR. FEICHT: We do not believe that that is the case.
11 There were preliminary discussions where the union
12 representative, Michael Moats, service unit director, floated
13 the idea that the Plaintiff resign in lieu of termination and
14 whether there would be an interest in trying to resolve this.

15 I am not aware of any formal settlement offer, and if
16 this was confidential settlement communications, any of that
17 would have been waived by virtue of the production.

18 THE COURT: Is that all we want to say about 408, the
19 408 issue?

20 MR. FEICHT: Yes.

21 THE COURT: Okay. I am going to err on the side of
22 caution with respect to this part of the exhibit on Bate stamp
23 69 and I am not going to allow that paragraph, that paragraph
24 that begins with "the prospect".

25 MR. CURLEY: Your Honor, can I be heard on this?

1 *THE COURT:* Well, I just allowed everyone to be heard
2 on that.

3 *MR. CURLEY:* The fact of the matter is, there was
4 testimony yesterday where the Plaintiff got up on the stand and
5 talked all about this issue, talked all about his conversations
6 with the attorney and clearly opened the door to these
7 communications.

8 No objections were made by his counsel.

9 *THE COURT:* Okay, I have already made a ruling that he
10 has opened the door as relates to attorney/client discussions,
11 however, within the attorney/client discussions certain issues
12 have been raised.

13 This issue relates to compromise, offering
14 negotiations. Unless you are saying he opened the door --

15 *MR. CURLEY:* I am saying that, that is exactly what I
16 am saying. He got up on the stand and talked about resolving
17 this and not resolving this and the reasons for that, and they
18 didn't stop him.

19 *MR. FEICHT:* The question was on direct, were you
20 trying to resolve this? Answer: Yes.

21 *THE COURT:* All right.

22 *MR. CURLEY:* That is opening the door.

23 *THE COURT:* One at a time.

24 *MR. CURLEY:* He was making it sound like he was trying
25 to resolve this and painting the impression with the jury that

1 we are the unreasonable ones. That is simply unfair, they
2 can't put on that kind of testimony and try to prevent us from
3 responding.

4 *MR. BENZION:* Matthew Benzion for the Plaintiff.

5 I believe that is taken very far out of context and
6 the Defendant is going to have to show the context in order to
7 support the entry of this evidence.

8 The Plaintiff, my recollection is that he was
9 testifying about his efforts in contacting the administrators
10 while going through the disciplinary process and asking for
11 clarification and trying to resolve and work out the dispute
12 from early October through December.

13 *THE COURT:* Okay, okay. So I am going to -- I
14 appreciate the additional argument. I am going to keep out
15 that paragraph starting with "the prospect of settling" and
16 going through the end of that paragraph and ends with "the
17 book", period, and that is on 408.

18 As to the particular statement made on Bates number 70
19 that indicates "unfortunately this puts a hole in the First
20 Amendment claim I was looking at, but I am still looking," the
21 Court finds that, under 403, the prejudicial effect of this
22 statement outweighs any probative effect given the issues in
23 this case, particularly since the statement was made by an
24 attorney which carries with it the potential danger of undue
25 weight.

1 With respect to Bates number -- the statement on Bates
2 number 68 about "this is particularly true where the charge
3 finds its basis in insubordination," this does not represent an
4 opinion on an ultimate issue under Rule 704 as the Plaintiff
5 had already received a notice of termination, nor does the
6 statement reflect that it is the declarant's opinion. And in
7 any event, under 704(a), even if it were on an opinion on an
8 ultimate issue, it is not objectionable just because it
9 embraces an ultimate issue. That part is overruled.

10 Federal Rule of Evidence 801(d)(2)(D) says that
11 statements offered against an opposing party that are made by
12 the party's agent or employee on a matter within the scope of
13 the relationship while the relationship existed are not
14 hearsay. Here the Court makes the finding that Plaintiff's
15 former attorney, Thomas Johnson, was an agent for Plaintiff.
16 The rule does not state that for statements to apply under
17 (d)(2)(D), 801(d)(2)(D), those statements must be made to a
18 third party.

19 There is case law for the proposition that statements
20 made by a agent to the principal qualify for the (d)(2)(D)
21 exception. For example, in *Mahlandt versus Wild Canid Survival*
22 *& Research Center*, 588 F.2d 626, an Eighth Circuit 1978 case, a
23 Defendant argued that 801(d)(2) exceptions do not provide for
24 the admission of, quote, "in-house statements"; that is it only
25 allowed for admissions made to third parties.

1 After an extensive review of the rule advisory notes
2 and commentaries on evidence, the trial court admitted the
3 evidence notwithstanding the fact that it was not made to third
4 parties. Other courts have reached the same conclusion. For
5 example, the Fifth Circuit has noted that ordinarily the
6 statement of an accountant made regarding his employment with a
7 party will not be considered hearsay under Rule 801(d)(2)(D)
8 even in a criminal case. *United States versus Diaz*, 515 F.2d
9 892, Note 4, Fifth Circuit, 1975; *Hayes versus United States*,
10 407 F.2d 189, Fifth Circuit, 1969, and see also *Reid Brothers*
11 *Logging Company versus Ketchikan Pulp Company*, 699 F.2d 1292,
12 Ninth Circuit 1983. Commentaries support this proposition as
13 well, see *Federal Evidence*, commentary in the book by Steve
14 Goode, 2015 edition.

15 So, with respect to statements made by Thomas Johnson
16 to James Tracy, as long as they were made within the scope of
17 his employment with James Tracy, the Court concludes that the
18 statements would be admissible.

19 So, we are talking about 216-A, and at this point the
20 scope of the relationship is such that Mr. Johnson was serving
21 as an agent for Professor Tracy, so everything other than what
22 I have excluded is admissible.

23 MR. CURLEY: 216-A, so I don't mess this up, the first
24 page is fine.

25 THE COURT: Yes.

1 MR. CURLEY: What else is okay?

2 THE COURT: Everything is okay -- not everything,
3 everything is okay except the second page, Bate 69,
4 paragraph -- "prospect of settling", that whole paragraph comes
5 out.

6 MR. CURLEY: The one I love so much, yes.

7 THE COURT: The next page, Bates 70, the statement
8 "unfortunately this puts a hole in the" -- I am still looking,
9 that comes out also.

10 MR. CURLEY: Unfortunately comes out. Okay.

11 THE COURT: Those redactions need to be made. If you
12 are putting anything up on the screen, make sure that is
13 blanked out. We need to bring the jury in, they have been out
14 a long time.

15 MR. BLICKENSDEFFER: We have a limited instruction
16 prepared for this testimony.

17 THE COURT: I did suggest a limiting instruction may
18 be appropriate when we are talking about statements.

19 MR. FEICHT: Your Honor, we received a copy, and we
20 have proposed instructions.

21 THE COURT: Let me see them, I will take a look at
22 them.

23 MR. FEICHT: May I approach?

24 THE COURT: Yes.

25 MR. FEICHT: It is in handwriting. I apologize for

1 that.

2 *MR. BENZION:* Your Honor, Matthew Benzion for the
3 Plaintiff. I have one more issue to discuss with the Court.

4 *THE COURT:* The Plaintiff's proposed instruction is:
5 You are about to hear evidence from Professor Tracy's former
6 union appointed counsel, Thomas Johnson. The evidence may be
7 in the form of testimony, emails or otherwise. You should not
8 give the emails any special consideration because Mr. Johnson
9 is an attorney. You should evaluate the evidence as you would
10 any other evidence in this case.

11 And the Defendant would have me read: You are about
12 to hear evidence from Professor Tracy's former counsel, Mr.
13 Thomas Johnson. The evidence may be in the form of testimony,
14 emails or otherwise. Although Mr. Johnson was Plaintiff's
15 attorney, his advice is not dispositive of the issues in this
16 case. You should evaluate the testimony and evidence as you
17 would any other testimony or evidence in this case.

18 Okay, I am going to use the Plaintiff's limiting
19 instruction.

20 What is the next issue?

21 *MR. BENZION:* Based upon the Court's ruling, it may
22 become necessary during our redirect that the Plaintiff will
23 have to testify that he ultimately sued the union and the
24 people who formerly represented him.

25 *THE COURT:* We can take that up before redirect, we

1 will have a break sometime before then, just in the interest of
2 time.

3 MR. LEO: Your Honor, it is possible it could come out
4 during the cross as well. That is why I think you would want
5 to address it before Mr. Curley continues, only given there is
6 a confidentiality provision in the agreement between the
7 Plaintiff and his former union officials.

8 We would like a cautionary instruction to the
9 Plaintiff to be permitted to caution the Plaintiff and make
10 sure he doesn't breach the confidentiality agreement. It is a
11 very narrow confidentiality agreement.

12 THE COURT: Is there any question that is going to
13 touch on this?

14 MR. FEICHT: We will be getting into, similarly, just
15 like Mr. Johnson's advice to the Plaintiff in this time frame,
16 the union, service union director and other officials. There
17 was testimony that he was relying on them as well. We have
18 similar communications between union officials and Plaintiff's
19 former attorney.

20 THE COURT: What is the issue?

21 MR. FEICHT: We will not get into any confidentiality
22 issue.

23 THE COURT: If you are not going to get into the
24 confidentiality issue I will leave it alone.

25 MR. BENZION: Our concern is Plaintiff's responses, we

1 ask that we be permitted to remind the Plaintiff of the
2 confidentiality provision in the settlement agreement.

3 *THE COURT:* Is he not here?

4 *MR. BENZION:* I did tell him to step out. We don't
5 want to say anything to him about his testimony.

6 *THE COURT:* Okay, no problem.

7 *MR. FEICHT:* Excuse me, your Honor, one point of
8 clarification. I stated earlier I did not think there was a
9 formal settlement offer in this context of the post notice
10 termination discussions. We have conferred with our client and
11 there was never a formal offer made. I don't know if the
12 ruling was pending on if a formal settlement offer was made.
13 It was not.

14 *MR. LEO:* Counsel may have communicated that an offer
15 was made or there were negotiations going on. There was talk
16 between FAU counsel and union representatives.

17 *MR. BENZION:* If Plaintiff were questioned, his
18 testimony would be that he was discussing settlement offers
19 with his lawyer.

20 *MR. FEICHT:* The rule is intended to exclude offers of
21 settlement. That is after the car accident, don't worry, I
22 will take care of it and pay for the damage, those types of
23 statements. Those are not what is trying to be offered here,
24 those are Plaintiff's agent's communications to Plaintiff.

25 *THE COURT:* Let's have Professor Tracy take the stand

1 again, please.

2 MR. LEO: Your Honor, regarding confidentiality --

3 THE COURT: Do that quickly, so I can ask him about
4 the settlement.

5 MR. LEO: I would like to show him the
6 confidentiality --

7 THE COURT: Let's hurry up. We have been on break
8 longer than we anticipated.

9 Dr. Tracy, if you'd take the stand. I want to ask
10 you, there is a comment that you make in your email at 216-A --
11 I don't know if somebody could give Dr. Tracy a copy of that
12 email. You say "the prospect of settling for my salary through
13 spring is not attractive."

14 Please explain to the Court the prospect of settling
15 for my salary through spring. Who, if anyone, made an offer
16 for you to settle by giving you salary through the spring?

17 THE WITNESS: As I recall, your Honor, I was speaking
18 with Thomas Johnson, my counsel, and he was in communication
19 with Lawrence Glick of FAU, general counsel of FAU, and they
20 were discussing a settlement of some sort and this is what we
21 discussed over the telephone.

22 THE COURT: You and your attorney?

23 THE WITNESS: Yes.

24 THE COURT: Was it expressed to you that this was an
25 offer being made by the school?

1 *THE WITNESS:* Yes. As I recall, it was a very short
2 time frame, I had to decide within the course of about an hour
3 or morning because the Board of Trustees was going to decide
4 that day or that morning.

5 *THE COURT:* So it was presented to you by your
6 attorney, it is your testimony -- it was presented to you by
7 your attorney that FAU extended this offer as a settlement, do
8 you want to take it or not?

9 *THE WITNESS:* Yes, and the trustees had to vote, so I
10 had to make a decision right then and there on the phone.

11 *THE COURT:* At this point in time, based on that
12 proffer, I will adhere to the ruling and exclude it. If things
13 develop and other persons come in and make other proffers and
14 changes, the Court will revisit, and leave it up to counsel to
15 bring it to the Court's attention if someone believes something
16 is contrary to the testimony that Dr. Tracy just gave.

17 Okay.

18 *MR. CURLEY:* On 70, your Honor, before the jury comes
19 in, I want to make sure I don't mess this up.

20 *THE COURT:* On 70?

21 *MR. CURLEY:* The third page of it.

22 *THE COURT:* Yes, I see it.

23 *MR. CURLEY:* The last, "but I am still looking."

24 *THE COURT:* It goes with the sentence before,
25 "unfortunately this puts a hole in the First Amendment claim I

1 was looking at, but I am still looking." That comes out, they
2 go hand in hand.

3 MR. CURLEY: Glad I asked. Will the Court accept the
4 exhibit as our proffer?

5 THE COURT: Yes.

6 MR. CURLEY: We obviously have issues with the ruling,
7 your Honor.

8 THE COURT: Yes, and as to the offer issue, settlement
9 offer, for right now, that is coming out based on what Dr.
10 Tracy said. If other things emerge that you can represent to
11 the Court that it doesn't fall within 408, I will hear it and
12 maybe I will change my ruling, but you will have to bring it to
13 my attention.

14 MR. CURLEY: Thank you, your Honor.

15 (Thereupon, the jury returned to the courtroom).

16 THE COURT: Okay, you may be seated.

17 I am very sorry, I told you it would be a short break,
18 but it was a long break. We resolved the issue, and that was
19 important and necessary.

20 So, with that, let's bring -- Professor Tracy is on
21 the stand so let's pick up where we left off.

22 I guess I leave it up to Plaintiff to tell me when you
23 want to read the limiting instruction.

24 MR. CURLEY: You may want to do it now. I will go
25 directly into the exhibit.

1 *THE COURT:* Okay. So, ladies and gentlemen, you are
2 about to hear evidence from Professor Tracy's former union
3 appointed counsel, Thomas Johnson. The evidence may be in the
4 form of testimony, emails or otherwise. You should not give
5 the testimony any special consideration because Mr. Johnson is
6 an attorney. You should evaluate the testimony and evidence as
7 you would any other testimony or evidence in this case.

8 Okay.

9 *BY MR. CURLEY:*

10 *Q.* All right, sir, I hand you what is marked 216-A. Do you
11 see that?

12 *A.* Yes.

13 *Q.* And that is an email from Mr. Johnson to you, correct?

14 *A.* Yes. Bates 70 --

15 *Q.* 68, 216-A, front page. Are you with me?

16 *A.* Yes.

17 *MR. CURLEY:* Your Honor, I move 216-A into evidence.

18 *THE COURT:* With the matters that we discussed in that
19 form, any objection?

20 *MR. LEO:* Standing objection, your Honor, previously
21 expressed.

22 *THE COURT:* All objections are noted in other words.

23 *MR. LEO:* Yes.

24 *THE COURT:* With the modifications that the Court
25 indicated, 216-A is admitted.

1 (Whereupon Defense Exhibit 216-A was marked for evidence.)

2 BY MR. CURLEY:

3 Q. Mr. Johnson was your attorney at the time, right?

4 A. Yes.

5 Q. This is January 7, 2016, at 12:15 p.m. he sent you this
6 email, right?

7 A. Yes.

8 Q. All right. At this time I would like to read the email to
9 the jury.

10 "The difficulty with a ULP is that your activities have to
11 be protected and concerted. And while your concerns regarding
12 the forms may be protected (I say may because it appears that
13 the forms have remained largely the same since 2013) there do
14 not appear to be any other employees who joined in your
15 concerns, even though you sent your concerns to them. In
16 addition, the general rule is that you work first and grieve
17 later. Your refusal to sign the document, and then raise your
18 concerns with your employer leaves us in an untenable position.
19 This is particularly true where the charge finds its basis in
20 insubordination.

21 "I am trying like hell here, Jim, but I keep running into
22 walls."

23 All right, sir, I would like to turn your attention to
24 page -- Bate stamp TJ70.

25 This is another email from Mr. Johnson, right, or is this

1 from you? No, this is from Mr. Johnson.

2 I would like to read this to the jury as well, your Honor.

3 "I have not sent anything in writing to Mr. Glick as we are
4 trying to resolve this matter and anything in writing will only
5 cause problems later on when it becomes public record, since
6 all communications are verbal. As I recall, your explanation
7 was it was the editor who put P-R-O-F, in quotes, in front of
8 your name. I did share this with him and he wanted to know
9 what measures were taken to prevent the editor from continuing
10 the practice. A subsequent review of the
11 documentation/chronology has led to the dispute that led to the
12 circumstances that occurred prior to the release of Nobody Died
13 at Sandy Hook."

14 217-A.

15 MR. CURLEY: May I approach, your Honor?

16 THE COURT: Yes.

17 BY MR. CURLEY:

18 Q. I have handed you what is marked 217-A.

19 Let me ask you, Michael Moats, who is he?

20 A. He is the United Faculty of Florida statewide unit service
21 director for South Florida.

22 Q. And Thomas Johnson was your attorney at this time?

23 A. Yes.

24 Q. All right, sir. Did you tell Mr. Moats that you thought
25 tenure protected you from anything you wanted to do or say?

1 A. I don't recall.

2 Q. All right, sir.

3 MR. CURLEY: Your Honor, I would like to admit 217-A
4 into evidence, two pages.

5 THE COURT: Any objection?

6 MR. LEO: Objection hearsay, your Honor, a statement
7 by Mr. Moats.

8 THE COURT: Response.

9 MR. CURLEY: It is the same basis, your Honor, as
10 before, this is a conversation between his agent and Mr.
11 Moats.

12 MR. BENZION: There is no statement by --

13 THE COURT: This is from Mr. Moats?

14 MR. CURLEY: Received by his agent.

15 THE COURT: Right, that is different than a statement
16 made by the agent.

17 I don't see how 217-A, the email from Michael Moats to
18 Thomas Johnson, falls into what we discussed.

19 If you want to show the witness for purposes of
20 refreshing recollection as he indicated he didn't recall
21 something, but that portion would be hearsay. The remaining
22 portion of the document which appears to be a letter from James
23 Tracy would otherwise be admissible under 801(d)(2)(D).

24 MR. CURLEY: All right. Your Honor, I will see if we
25 can refresh recollection.

1 *BY MR. CURLEY:*

2 *Q.* Do you see the first sentence there, Professor Tracy?

3 *THE COURT:* So it is not being shown to the jury at
4 this point.

5 *MR. CURLEY:* That is correct.

6 *THE COURT:* The witness is looking at 217-A.

7 *BY MR. CURLEY:*

8 *Q.* Yes. Do you see the first sentence that begins "note"?

9 *A.* I should preface my remark by saying this is the first time
10 I have seen this email.

11 *Q.* All right. Take a peak at the first sentence, then.

12 Do you see it?

13 *A.* Yes.

14 *Q.* Do you recall telling Mr. Moats that you thought tenure
15 protected you and allowed you to say whatever you want?

16 *A.* I do not.

17 *Q.* All right.

18 *A.* I think that we may have discussed -- we had a lengthy
19 telephone conversation that day or the day prior, February --
20 excuse me, December 17 or 18, and, of course, I was --

21 *MR. CURLEY:* This is nonresponsive, your Honor.

22 *THE COURT:* So, I want to be clear on 217-A, you are
23 not seeking to -- at this point, there was a portion -- the
24 Court would allow a portion, there is a portion the Court is
25 not allowing. Are we leaving 217-A being marked, but not in?

1 MR. CURLEY: Marked for identification and when Mr.
2 Moats testifies by deposition we will put it in.

3 THE COURT: 217-A is marked only.

4 MR. CURLEY: May I approach, your Honor?

5 THE COURT: Yes.

6 MR. LEO: Objection, Your Honor, same grounds.

7 THE COURT: Um-m-m, what is the document?

8 MR. CURLEY: Defendant's Exhibit 52, your Honor.

9 MR. LEO: Hearsay, other than what the Plaintiff said.

10 THE COURT: Okay, it would seem as if the ruling
11 should be the same.

12 MR. CURLEY: It goes to the issues that the Plaintiff
13 testified to yesterday regarding his state of mind and what he
14 had been told by the union and --

15 THE COURT: Well, you can ask him about it. The
16 subject matter is open to discuss, but I don't know that that
17 makes an otherwise hearsay document admissible. But the
18 subject matter can be discussed with the witness.

19 MR. CURLEY: All right.

20 THE COURT: If you want to bring legal authority at a
21 later point why it would be admissible, the Court will
22 entertain that. At this point, those portions of 52 that are
23 not statements of the Plaintiff the Court is not going to admit
24 at this time.

25 Do you want to have it marked or seek to have it

1 redacted at this time and have the portions that Professor
2 Tracy --

3 MR. CURLEY: I would rather have Professor Tracy
4 authenticate his portions and when Mr. Moats testifies by
5 deposition he will authenticate the rest.

6 THE COURT: You are not seeking to identify it for
7 admittance at this time?

8 MR. CURLEY: No.

9 THE COURT: All right. It will be marked for
10 identification.

11 BY MR. CURLEY:

12 Q. Did Mr. Moats tell you that you know --

13 MR. LEO: Objection, he is reading, hearsay.

14 THE COURT: I wouldn't read from the document.
15 Rephrase your question without getting into the content of the
16 document.

17 BY MR. CURLEY:

18 Q. Did he tell you that you know you are not being terminated
19 over free speech issues, it was your refusal to sign the forms
20 that was the reason for your termination?

21 A. Did Michael Moats tell me that?

22 Q. Yes.

23 A. At which time?

24 MR. LEO: Objection, calls for hearsay.
25

1 BY MR. CURLEY:

2 Q. December 20, 2015, 11:26 a.m.

3 MR. LEO: Same objection.

4 THE COURT: I won't allow the reading of the email,
5 but you can ask questions about the subject matter.

6 BY MR. CURLEY:

7 Q. Did he tell you you were --

8 MR. LEO: Objection, hearsay.

9 THE COURT: No. You can -- the question can be asked
10 of the witness, has he been told something.

11 BY MR. CURLEY:

12 Q. Okay. Thank you, your Honor.

13 Did he tell you that you were being terminated for
14 insubordination, not free speech?

15 A. According to this email --

16 THE COURT: Well, the content of the email for Mr.
17 Moats is not coming in. You can use it to refresh your
18 recollection and you can answer the question if you are able
19 to.

20 THE WITNESS: Could you restate the question, please.

21 BY MR. CURLEY:

22 Q. Yes. Did he tell you you were being terminated for
23 insubordination, not free speech?

24 A. On the telephone, email or what?

25 Q. I will say by email, did he tell you that?

1 A. In the context of 2013, I believe so, yes.

2 Q. What was Mr. Moats' role with the union, being what was his
3 job?

4 A. Title of the job?

5 Q. Yes, sir.

6 A. Service unit coordinator, or director, excuse me.

7 Q. What were his duties on behalf of the union towards you?

8 A. When I was president, this was something -- he would come
9 by and aid in membership in terms of building the membership of
10 the campus university as far as encouraging dues-paying members
11 to join. That was one of his functions, as I recall, in my
12 contacts with him, and also working with the grievance or
13 contract enforcement chairs.

14 Q. How long had you known Mr. Moats to be affiliated with the
15 union?

16 A. I believe I met Mr. Moats in 2010.

17 Q. All right. So, at least through five years until the
18 termination of your employment he was with the union, and you
19 knew that, right?

20 A. Yes.

21 Q. And when you were union president you worked with Mr.
22 Moats?

23 A. At the time, when I was union president, the service unit
24 coordinator for our area was Bruce Nisson (phon), who was a
25 professor or instructor at Florida International University and

1 went to join the UFF in that position. I think Mr. Moats was
2 serving another area of the state.

3 Q. Is Mr. Moats someone that you came to rely upon for advice,
4 or advice regarding union activities?

5 A. Sometimes. Frequently the person I would come in contact
6 with when I was functioning in the union was Ed Mitchell, who
7 was the executive director.

8 Q. Was it ever Mr. Moats, did you ever talk to him about union
9 issues and things like that?

10 A. In 2013, yes.

11 Q. And I think you mentioned something about he gave you
12 contrary advice in 2013; is that right? Is that what you were
13 going to say?

14 A. No, he did not, he gave the correct advice in 2013.

15 Q. What did he tell you?

16 A. He told me that it was not necessary to fill out the
17 outside employment business activity forms.

18 Q. In 2013, did you have a donate button on your blog?

19 A. I don't believe so.

20 Q. Had you written a book that you hadn't told the school
21 about?

22 A. I never wrote a book, so that is a mischaracterization.

23 Q. Were you doing a podcast from your office?

24 A. In 2013?

25 Q. Yes.

1 A. No.

2 Q. We talked earlier about the advice of complying with
3 supervisors' instructions and then grieve. Do you remember
4 that?

5 A. Yes.

6 Q. So, I want to go through people that asked you to comply.
7 All right? You would agree with me that Vice Provost Alperin
8 asked you to comply, right?

9 A. At which time?

10 Q. At any time.

11 A. Any time between what dates?

12 Q. While you were employed by FAU.

13 A. So, from 2002 to 2016.

14 Q. Yes, sir.

15 A. Okay.

16 Q. Did she ask you to file forms?

17 A. At the meeting, perhaps, on the 18th of January of 2013, I
18 forget who brought that up, but the letter summarizing the
19 events -- or rather what we discussed at the January 18th
20 meeting came from Dean Coltman.

21 Q. When you got the letters near the end of your employment,
22 did you get the impression that they wanted you to fill out the
23 forms and comply?

24 A. Which party -- which university agent are you referring to?

25 Q. Well, we can talk about Dean Coltman or Vice Provost

1 Alperin. Did you get the impression they wanted you to fill
2 out the forms?

3 A. Which time?

4 I am confused. First you said you would go through each
5 university official and now you are taking a different path. I
6 want to be clear.

7 Q. At the end, the termination letter was from Vice Provost
8 Alperin, right?

9 A. The notice of intent to terminate and the termination
10 letter, yes.

11 Q. And in those letters, did it seem to you that she was
12 seeking to have you fill out the forms?

13 A. No. They were terminating me.

14 Q. In the notice of intent, did it occur to you, hey, maybe I
15 ought to fill out the forms real quick and send them in, and
16 maybe I could move through this?

17 A. I had 24 hours prior.

18 Q. They thought there were things missing from what you filled
19 out, wasn't there?

20 A. Which they never informed me of.

21 Q. Never told you about the book; is that your testimony?

22 A. I'm sorry?

23 Q. They never told you about the book, Sandy Hook?

24 MR. LEO: I object to vague.
25

1 BY MR. CURLEY:

2 Q. They never asked you any questions about this; is that what
3 you are telling the jury?

4 A. They did bring that up, and I think you showed me that
5 letter.

6 Q. Did you disclose -- when they said, hey, what about the
7 book, did you fill out the form and go, okay, here is what it
8 is all about, I think it is all right?

9 A. On January 4th?

10 Q. Yes.

11 A. I was represented by counsel at that time and counsel
12 received that notice on my behalf. So, if there was going to
13 be a response, I was relying on Thomas Johnson, my union
14 attorney, to respond. He informed me that the notice was
15 received.

16 Q. That is the same guy we just read the email where he said
17 you engaged in insubordination, right?

18 MR. LEO: Objection, mischaracterization.

19 THE COURT: Sustained as to the characterization of
20 the email. You can refer back to the email if you want. I
21 will sustain the objection.

22 BY MR. CURLEY:

23 Q. You still have it up there, 216-A.

24 Did he say, "this is particularly true where the charge
25 finds its basis in insubordination?" Did I get that right?

1 A. This was, I think, a day or two before Mr. Johnson was
2 considering a First Amendment lawsuit --

3 Q. Okay.

4 A. -- against FAU.

5 I must also mention, and I believe this came up in
6 testimony previously --

7 MR. CURLEY: This is unresponsive, your Honor.

8 THE COURT: Okay, wait for the next question.

9 BY MR. CURLEY:

10 Q. You mentioned something about the First Amendment. Can we
11 go two pages back. This is the email we looked at before.

12 Do you see that last sentence, "subsequent review of the
13 documentation led to the" -- it occurred before that, right,
14 that is what he is telling you?

15 MR. LEO: Objection, vague.

16 THE COURT: Overruled.

17 MR. LEO: Objection, counsel is testifying.

18 THE COURT: Sustained.

19 BY MR. CURLEY:

20 Q. All right.

21 A. That is incorrect, Mr. Johnson was poorly apprised of the
22 facts of the case. I don't even know the date of this email.

23 Q. Okay.

24 A. I believe that it is -- could you tell me?

25 Q. I am sure your counsel can ask you questions about it.

1 I am trying to comply with the Court's order.

2 A. This is --

3 MR. CURLEY: Nonresponsive.

4 THE COURT: There is a document on the screen right
5 now, number 69 on the bottom, I believe the date is there. It
6 is on the screen right now.

7 MR. LEO: This is a poorly constructed composite
8 whereas there are dates all over the place.

9 THE COURT: Okay, I will allow you to clarify it on
10 redirect.

11 BY MR. CURLEY:

12 Q. Do you see the date there, January 7, 9:36 a.m.?

13 A. I see it now, yes, thank you.

14 Q. Okay. So, who is Mr. Broadfield? I heard you mention his
15 name.

16 A. He is the -- he is a former associate professor of
17 anthropology at FAU and he was the contract enforcement or
18 grievance chair for the chapter at FAU, UFF chapter, union
19 chapter.

20 Q. Did he give you the advice in 2013 that comply and grieve
21 is the way to go?

22 A. What time in 2013?

23 Q. Any time.

24 A. I don't -- I would have to have more context.

25 Q. What about Mike Budd, who is he?

1 A. Mike Budd is a former senior colleague in the School of
2 Communication and Multimedia Studies. He is a film study
3 scholar, and a long-time union member, and he was involved in
4 membership development. At the time of my leaving FAU, he was
5 Professor Emeritas in the school.

6 Q. Did he give you the same advice, good to comply and if you
7 have a problem, grieve?

8 A. What time?

9 Q. Any time.

10 A. I am not sure, I do not recall.

11 Q. What about your attorney, Mr. Johnson, did he tell you the
12 general rule is work first and grieve later?

13 A. I believe there is something in the emails where he does
14 state that, yes.

15 Q. Okay.

16 A. The emails that you just presented.

17 Q. Right. Who is Tim Lenz?

18 A. He is the former department chair person of political
19 science at Florida Atlantic University, professor of political
20 science, and I believe he was involved in UFF as the president,
21 the grievance or contract enforcement chair, and he was also a
22 faculty senate president at FAU.

23 Q. Did he tell you to submit the forms your supervisor is
24 requiring and then grieve if you have a problem?

25 A. I know we had a telephone conversation in November 2015. I

1 am not sure if he said that expressly or specifically.

2 Q. Who is Bob Zoller?

3 A. He was the president of the United Faculty Florida chapter
4 in 2015, and also a professor of exercise science in the
5 College of Education, I believe.

6 Q. Did he tell you to sign the forms and if you had a problem,
7 you could fight it later?

8 A. I believe he said that in the email, yes.

9 Q. Obviously Dean Coltman asked you to fill forms out, right?

10 A. At what time?

11 Q. Well, certainly we saw the recommendation, I guess that was
12 in January of 2013. That is when it started, right?

13 A. Yes.

14 Q. Okay. And then later on we had the check box incident, and
15 then she was asking you several times to fill out the forms,
16 right?

17 A. In 2015?

18 Q. Yes, sir.

19 A. There was the letter of November 10 and the email giving me
20 a 72-hour deadline, I believe, on December 11.

21 Q. Okay.

22 And that is it?

23 A. From Dean Coltman in 2015?

24 Q. Yes, sir.

25 A. As I recall, yes.

1 Q. What about Mr. Williams, your direct supervisor, how many
2 times did he ask you to check the box and fill out the forms?

3 A. Well, as was the case with Dean Coltman, I had a very
4 involved exchange with both of those individuals, my
5 supervisor, and supervisor's supervisor, if you will,
6 concerning my specific concerns regarding the outside
7 activities policy, how it applied to me and the special
8 situation I was involved in because of the settlement agreement
9 from 2013.

10 Q. The settlement agreement doesn't say anything about the
11 forms, does it?

12 A. About the outside activity policy or the university forms?

13 Q. Forms.

14 A. I was asking if this involved the outside business
15 employment forms, if this involved university policy or if this
16 involved Article 19.

17 Q. Do you see the settlement agreement there?

18 A. Yes.

19 Q. I don't see anything about conflict of interest forms,
20 things like that in there. Do you?

21 A. No.

22 Q. Okay. This is the agreement you struck not to talk about
23 your relationship with FAU when you write your blog and do
24 outside activities, right?

25 A. Yes.

1 Q. Like the book, that was an outside activity in your
2 opinion, right?

3 A. Yes.

4 Q. Okay.

5 A. The blog posts in the book, yes.

6 The university was -- if I may continue.

7 Q. It is probably best that you let your attorney ask you
8 questions when I am done.

9 I want to ask you a few questions about some of the courses
10 you were teaching while you were at FAU. You taught a course
11 called The Culture of Conspiracy, right?

12 A. This was a special topics course, yes.

13 Q. Was that a course that dealt with conspiracies?

14 A. It was a course, as the title suggests, that dealt with the
15 notion of conspiracy, conspiracy theories and the like, in a
16 social, cultural, historical context, and more specifically how
17 conspiracies, if you will, are covered in the mass media,
18 specifically the news media.

19 And that is a very broad overview of what was covered in
20 the course, but conspiracy itself as a cultural phenomenon had
21 mostly to do with the pejorative conspiracy theory as used by
22 the news media.

23 Q. Is it fair to say the subject matter of your blog was
24 something that you did talk about in class, but not theories?

25 A. I'm sorry?

1 Q. In your -- with your classes, did you share the subject
2 matter of your blogs? Did you do that?

3 A. In class, in the classroom, no, I did not.

4 Q. Okay. So, you would deny that you -- the subject matter --

5 A. If the question is, did I put my blog up on the overhead or
6 the equivalent, the internet, and discuss the blog posts, that
7 is something I did not do, no.

8 Q. The question is, the subject matter of the things that you
9 would talk about on your blog, did you talk about that subject
10 matter in your classes?

11 A. If they were addressed in scholarly treatments, yes, book
12 like treatments.

13 Q. So, the subject matter was shared with your class, not
14 theories, methods. Is that a fair statement?

15 A. I'm not sure.

16 Q. Okay. Have you ever told that to anybody?

17 A. Pardon?

18 Q. Have you ever said that you shared the subject matter with
19 your classes, just not the theories and methods?

20 A. That is a statement that is out of context. I may have
21 said that, I don't know.

22 Q. One of the things that went into evidence while you were
23 testifying was Plaintiff's exhibit 47.

24 All right, sir, this looks like, I don't know, 126 -- I am
25 not sure, it has -- maybe you can tell me how many pages it is.

1 It looks pretty thick.

2 The title of it is Sandy Hook Massacre, Unanswered
3 Questions and Missing Information, right?

4 A. Yes.

5 Q. Is this something you put together?

6 A. Yes.

7 Q. So, this is something that is put together from what,
8 reviewing other articles and things like that, or how did you
9 do it?

10 A. Well, primarily from news articles and the like for the
11 most part.

12 Q. So, you read these articles and then you summarize what you
13 take from that in this timeline. Is that how it works?

14 A. Well, there are two pieces here, Mr. Curley, there is the
15 Sandy Hook massacre, the title you just referenced, and the
16 second piece is the composite, Sandy Hook school massacre
17 timeline compiled over the course of a year -- over a year.

18 Q. All right. Do you footnote your sources?

19 A. I sometimes footnote, I sometimes hyper link.

20 Q. All right.

21 A. And I sometimes --

22 Q. I am sorry, what is the point of identifying the sources in
23 the blog articles?

24 A. Well, I have the sources at the bottom, and I have them --
25 I frequently have them hyper linked to whatever news article it

1 may be drawn from.

2 What is the importance of that?

3 Q. Yes. Why do you do that?

4 A. I am including documentation of what we are discussing.

5 Q. It is not to show that it is based on other research or
6 sources of information?

7 A. Well, on my blog, in most instances, it is news reports or
8 reports that appear in the alternative, non news media that are
9 frequently more accurate.

10 Q. Okay. Collective bargaining agreement, a couple of
11 questions about that, if I could.

12 A. Uh-hum.

13 Q. When you -- before you read the agreement, collective
14 bargaining agreement, and signed it, did you read it carefully?

15 A. I believe that I read it through. I'm not -- I don't
16 believe I necessarily read it cover to cover. I was relying in
17 part on the expertise of the bargaining committee, and the
18 grievance and contract enforcement chair that was there at the
19 bargaining meetings.

20 Q. You consider it a fairly important document, though, right?

21 A. Yes.

22 Q. But you don't think you read every article in the document
23 before you signed it?

24 A. It is something that has to be ratified first. If the
25 membership ratifies the document, I believe the president goes

1 ahead and signs on behalf of the membership.

2 Q. So you relied on other people to read it and tell you if it
3 was okay?

4 A. We are a body of academics.

5 Q. Okay.

6 A. And in many cases, it is not necessary to read the entire
7 document, depending on what is opened up to be bargained.

8 Q. All right. Let me get you to look at paragraph -- if you'd
9 go to paragraph 1.2(a) for a second. Let me know when you are
10 there. You can look on the board if it is easier.

11 Right there at the very beginning of the agreement it says:
12 If there are any inconsistencies, ambiguities in the
13 regulations or policies, whatever, the language of the
14 collective bargaining agreement, that is the final word, isn't
15 it?

16 MR. LEO: Objection, mischaracterization.

17 THE COURT: Overruled.

18 A. Yes. I am sorry, could you restate the question?

19 BY MR. CURLEY:

20 Q. I am not sure I can, but I will try.

21 The collective bargaining agreement says if there are
22 inconsistencies, unclarities, any kind of ambiguities, the
23 collective bargaining agreement, that is what you look at, and
24 it trumps everything else. How does that sound?

25 A. Yes, that is in fact the case.

1 Q. Okay.

2 A. If the agreement is something that is in the process of
3 being negotiated and not agreed upon, the previous agreement is
4 what stands as the rule.

5 Q. All right. Thank you, sir.

6 MR. CURLEY: May I approach, your Honor?

7 THE COURT: Yes.

8 BY MR. CURLEY:

9 Q. I hand you Exhibit 45, it looks like emails between
10 yourself and Mr. Zoller. Do you recognize that?

11 MR. LEO: Your Honor, hearsay, this is being offered
12 into evidence at this time.

13 MR. CURLEY: Your Honor, if it helps the Court, I am
14 just going to ask about his email to Mr. Zoller.

15 THE COURT: It is not being sought to be admitted?

16 MR. CURLEY: That is fine, I would like to read from
17 it.

18 THE COURT: Just the parts that Dr. Tracy has written?

19 MR. CURLEY: That is correct.

20 THE COURT: Okay. I will allow that and I will note
21 that Exhibit 45 is being marked.

22 MR. CURLEY: Thank you.

23 BY MR. CURLEY:

24 Q. Are you ready? This is going to be quick, I promise.

25 A. Yes.

1 Q. In this email you say, "I sent this as a pdf by email and
2 U.S.P.S. In my view, the university's policy language is
3 ambiguous, and the CBA is actually more straight forward."
4 That is the collective bargaining agreement, right?

5 A. Yes, sir.

6 Q. And at the top of that paragraph you say, "I printed out
7 the annual assignment and physically applied my signature thus
8 avoiding acknowledgment of the outside activities policy."

9 Why were you avoiding that?

10 A. Because it was something that was misstated in the pop-up
11 box and I felt as if I was being trapped. I already signed it
12 once previously electronically in 2015.

13 Q. And you said you signed it once. You are still there,
14 right, everything is cooking along?

15 A. Is that a question?

16 Q. You signed it earlier, I think you signed one in July,
17 right? You signed it -- you are talking about the box, you
18 clicked the box?

19 A. No. I signed my assignment, I don't recall there being a
20 box.

21 Q. Are you saying you never clicked a box?

22 A. I don't recall there being a box when I signed it the first
23 time in 2015. That is why I was somewhat taken aback when I
24 saw the box in October 2015, being prompted by the chair person
25 of the department to go in and resign my electronic signing.

1 Q. That is what we looked at before and that is the thing that
2 doesn't have anything about compensation and outside
3 activities, stuff like that. You signed your assignment,
4 right?

5 A. Are you talking about language in the pop-up box?

6 Q. The sign-in sheet. You might still have it.

7 A. I will take a look for it. I think I know what you mean
8 now.

9 Q. Right, I think it is 7, Plaintiff's 7, something like that.

10 It is just your assignment, doesn't have outside
11 activities?

12 A. Defendant's 7?

13 Q. No, Plaintiff's. It is okay, it is all right.

14 MR. LEO: It is not Plaintiff's 7.

15 MR. CURLEY: I am sorry, I am getting tired, I
16 apologize. Don't worry about it, I think the point is made.

17 BY MR. CURLEY:

18 Q. For purposes of doing your research at the university, did
19 you need to get anybody's approval?

20 A. For doing research that -- academic research?

21 Q. Yes. Was there any approval process for that or did you
22 have your own discretion to do research on what you felt was
23 appropriate at the school?

24 A. In all of my years at FAU, I would scope out and pursue
25 particular research projects and I would put them on my annual

1 assignment. Sometimes I put it on the annual assignment before
2 I began development of it, sometimes I put it on the annual
3 assignment after it was underway to a certain degree. There
4 are no hard and fast rules when one has to put it on the annual
5 assignment and embark on it.

6 Q. You would agree with me there is really no mechanism for an
7 activity for approval, you just disclose it, right?

8 A. I'm sorry, say that again. I am getting tired as well.

9 Q. That is okay. Were there any book chapters or journal
10 articles that you proposed to write that FAU prohibited you
11 from writing?

12 A. Once they were placed on my annual assignment or put on my
13 assignment by myself, as I previously described, as I recall,
14 no.

15 Q. No. Okay.

16 There was no mystery about your blog. They had already
17 discussed it with you in 2013, right?

18 A. At the January 18, 2013 meeting, yes.

19 Q. Now, at that point in time, there was no money coming in to
20 the blog, right?

21 A. At that time, no.

22 Q. And obviously it was relatively new, not a lot of time or
23 effort had gone into it, right?

24 A. It was probably, at that time, about ten months in, so,
25 probably not.

1 Q. All right. And over the course of '13, 2013, 2014, 2015,
2 how many pages of materials would you say you devoted to
3 memoryholeblog?

4 A. It will be difficult to say. I think that is something
5 that has been produced in discovery to you.

6 Q. It has. If I told you more than 10,000 pages of work
7 material, would that surprise you?

8 MR. LEO: Objection, counsel is testifying. Facts not
9 in evidence.

10 THE WITNESS: Well --

11 THE COURT: Just a minute. I will overrule the
12 objection. The witness can answer if he can.

13 THE WITNESS: A good deal of that work is not original
14 and it does not require an effort to, for example, post a You
15 Tube video in an entry with a paragraph describing the video.
16 It is a variety of things issued and published on the blog,
17 tech posts.

18 Some of them might be several paragraphs, might be
19 more detailed than be my effort, but many of them may have been
20 authored by someone else. It may be a reblog from someone
21 else's site. It is difficult to say without looking at each
22 individual entry.

23 BY MR. CURLEY:

24 Q. Okay. I am going to give you a chance.

25 MR. CURLEY: May I approach?

1 *THE COURT:* Yes.

2 *BY MR. CURLEY:*

3 Q. 224 is a list of all of the blogs and articles that you
4 told us about, right? This is the list while you were employed
5 at FAU, right?

6 A. The second part of that, this is the list --

7 Q. Is that it?

8 Okay, I am going to tell you there are at least 10,000
9 pages of materials right there. You are telling me you read
10 every one of those, right? You wouldn't post them without
11 reading them, would you?

12 A. I have to look at what you produced, I don't know what it
13 is, and I don't know if these include comments as well.
14 Frequently there might be a post on a blog and a hundred or 150
15 comments. I don't know if that is printed out, that could be
16 produced by you in the boxes for purpose of deception, I guess.
17 I don't know.

18 Q. There they are.

19 *MR. LEO:* Counsel is testifying.

20 *MR. CURLEY:* Take a peak.

21 *THE COURT:* Sustained. Pose whatever question you
22 have for the witness.

23 *MR. CURLEY:* I move 224-A, that is the summary, into
24 evidence.

25 *MR. LEO:* There is no objection to 224 --

1 THE COURT: Defendant's 224?

2 MR. LEO: 224-A, your Honor, no objection. For the
3 record, this is a redacted version of 224-A. Your Honor may
4 have a different version.

5 THE COURT: On my flash drive I don't have any 224-A.
6 It is called 224.

7 MR. CURLEY: A.

8 THE COURT: Are you seeking 224 or 224-A?

9 MR. CURLEY: 224-A, your Honor, the documents are
10 provided for demonstrative purposes.

11 THE COURT: Okay, so 224-A, and there is no objection
12 to 224-A.

13 MR. LEO: 224-A, I believe the agreement was 25 pages.
14 That is the exhibit that your Honor may have.

15 THE COURT: It does look like 25 pages -- actually 26
16 pages.

17 MR. LEO: Mine has 25.

18 THE COURT: Docket Entry 414-1, begins on page one and
19 maybe it is -- ends on page 26.

20 No objection?

21 MR. LEO: Mine ends on 25.

22 THE COURT: Can you confer?

23 MR. LEO: No objection.

24 THE COURT: Okay, 224-A is admitted without objection.

25 MR. CURLEY: Okay.

1 MR. LEO: I don't know what is in the boxes.

2 THE COURT: Here is 224-A.

3 MR. LEO: I don't know if they are demonstrative aids
4 or they put a bunch of papers in there.

5 THE COURT: I don't think the boxes are asked to be
6 admitted. That is 224-A and I will admit it.

7 (Whereupon Defense Exhibit 224-A was marked for evidence.)

8 MR. LEO: May I review the boxes?

9 THE COURT: You may, but the boxes are not being
10 admitted.

11 Is that correct?

12 MR. CURLEY: Correct.

13 THE COURT: Outside the jury, there is no objection to
14 reviewing what is in the boxes. Any objection to that?

15 MR. CURLEY: No.

16 THE COURT: Okay.

17 BY MR. CURLEY:

18 Q. So, we've got a 25-page list of things you wrote, some you
19 wrote, some you looked at, things you posted, right?

20 A. Yes.

21 Q. And on each page maybe there is 15, 20 different blogs.
22 Does that sound about right?

23 A. 12 or 15 perhaps, yes.

24 Q. Okay. And I think your testimony was before you spent a
25 few minutes -- five, ten minutes a day on it. Is that what you

1 were saying?

2 *MR. LEO:* Objection, mischaracterization.

3 *THE WITNESS:* No.

4 *BY MR. CURLEY:*

5 *Q.* Okay, how much?

6 *A.* An hour, hour and a half a day, something along those
7 lines.

8 *Q.* Okay.

9 So all of this -- you understand that with respect to the
10 outside activities forms, part of the obligation has to do with
11 conflicts of time and conflicts of commitment. Do you
12 understand what that means?

13 *A.* I understand.

14 *Q.* All right.

15 *A.* I followed my annual reviews, academic work was above
16 satisfactory or excellent for all of the years that you claim
17 are in the boxes.

18 *Q.* Oh, they are in the boxes, yeah. Okay.

19 So, your priority always remained to FAU. Is that your
20 testimony?

21 *A.* I always attempted to do my best in terms of teaching,
22 research and service.

23 *Q.* Okay.

24 *MR. CURLEY:* One moment, your Honor.

25 *THE COURT:* Yes.

1 *BY MR. CURLEY:*

2 *Q.* Do you still have the collective bargaining agreement up
3 there?

4 *A.* Yes.

5 *Q.* Would you turn to Article 19? It is on page 54.

6 *A.* 54?

7 *Q.* Yes. Article 19, 19.1: In all official acts employees are
8 bound to observe the highest standards of ethics. Do you see
9 that?

10 *A.* Yes.

11 *Q.* Do you think the highest standards of ethics suggests you
12 ought to err on the side of communication, conversation and
13 disclosure?

14 *A.* Say that again.

15 *Q.* High ethics, do you think that involves full disclosure?

16 *A.* Yes. Once I -- once there is clarification in terms of
17 university policy and so forth, absolutely.

18 *MR. CURLEY:* One moment, your Honor.

19 *THE COURT:* Okay.

20 *MR. CURLEY:* Nothing further, your Honor, thank you.

21 *THE COURT:* Okay. So, nothing further meaning that
22 concludes your cross and your direct?

23 *MR. CURLEY:* I am sorry, your Honor?

24 *THE COURT:* Nothing further means that concludes cross
25 and direct, concludes everything?

1 MR. CURLEY: There may be other subjects as we put our
2 case on. As you recall, we are reading some sections from the
3 deposition. For the moment, I think we are in pretty good
4 shape.

5 THE COURT: Okay. I am not suggesting we are going to
6 be doing it now. Is there going to be redirect from the
7 Plaintiff?

8 MR. LEO: Yes.

9 THE COURT: Approximately how long?

10 MR. LEO: We reserved an hour, I don't believe it will
11 take that long.

12 THE COURT: All right. So we'll conclude for the day.

13 First and foremost, I remind our witness, Dr. Tracy,
14 you remain under oath. As we just heard from your counsel,
15 there will be additional questioning on what will occur on
16 Monday, redirect examination. You remain under oath and do not
17 discuss your testimony with anyone.

18 To our very patient jurors, we want to thank you for
19 your time this week with us. I know it has been long hours,
20 and some of you are suffering from sniffles and colds, and I
21 hope that gets better over the weekend.

22 I may come across more emphatic than I am when we take
23 a break. Now, I will not see you for over 48 hours. First of
24 all, I hope you have a very enjoyable weekend, you deserve it,
25 and certainly can do whatever you would like to do, whether it

1 is recreational or professional obligations you have while you
2 serve as a juror.

3 However, to the extent that you broaden the base of
4 people who you may see over the weekend for social events or
5 otherwise, it may come up, what you have been doing this past
6 week. It is perfectly okay to say you are serving as a juror
7 in Federal Court, and that is it. Cut the conversation off at
8 that point.

9 Let the person who is talking to you, let them know
10 the judge says you can't say anything more, and that should be
11 the end of the conversation. Don't let yourself get dragged
12 into a conversation intentionally or inadvertently.

13 The prudent thing to do is to not watch local media in
14 the event there is any coverage of the case. If you absolutely
15 must keep up with local news, and I understand that is very
16 important, you must exercise every cautionary matter, including
17 maybe having a family member or friend look at something first
18 before you read it to make sure -- then again, no, I take that
19 back, a family member or friend shouldn't even know what you
20 can't look at.

21 I will take that back. Maybe you can just unplug this
22 weekend and not read and not listen.

23 I think you know the point, it is vitally important
24 you not listen to or review research online in any means, shape
25 form, any media coverage or any other exposure than what you

1 are hearing in this trial.

2 Again, I know you have been spending a lot of time
3 with each other. It is okay if you wanted to do something with
4 each other. If I happen to see two of you out to dinner or
5 lunch, there is nothing wrong with that, just you would not be
6 able to talk about the case. Refrain from any contact with the
7 attorneys and parties as you come and go this evening. They
8 are going to stay later than you, we may have to take up
9 matters.

10 Today is Friday, keep track of everything. We will
11 see you back on Monday, December 4th, at 9:00 a.m. with the
12 same -- you know, get here in time to be back in the jury room
13 to be pulled in at 9:00 a.m.

14 Have a nice enjoyable weekend. Thank you.

15 *(Thereupon, the jury leaves the courtroom.)*

16 *THE COURT:* Okay, we will do a quick preview for
17 Monday. So, the preview is that we think -- Dr. Tracy, you are
18 okay to come off the stand.

19 We think Dr. Tracy will be how long on redirect?

20 *MR. LEO:* I think it remains to be seen. I don't
21 anticipate more than an hour. I will try to keep it a lot
22 shorter, I do promise.

23 *THE COURT:* We'll say, at most, nine o'clock to
24 ten o'clock, and because it sounded like most of that was --
25 well, I guess all of it was cross-examination and there

1 wouldn't be the need for Defense to come back up and question
2 Dr. Tracy any further.

3 Of course, we will see what happens, but that will be
4 the plan since it was never designated that cross stopped and
5 direct started.

6 Then, what is the plan for the next witness that the
7 Plaintiff will call at or about 10:00 o'clock?

8 MR. LEO: Your Honor, I believe we are calling Diane
9 Alperin.

10 THE COURT: She has been here, and do we -- you had
11 anticipated in your trial plan four hours for your direct. Is
12 that still what you are thinking?

13 MR. LEO: Yes, your Honor.

14 THE COURT: Uh-hum. Have you all conferred about
15 exhibits that you anticipate might come in through Diane
16 Alperin and any unresolved issues?

17 MR. LEO: Not yet, but we do plan to after we leave
18 the courtroom.

19 THE COURT: I think there are enough rulings that most
20 things should be clear, but if there is not resolution to all
21 exhibits, then you will have to bring that to the Court's
22 attention and maybe -- why don't we say 8:45 on Monday morning
23 just so we can get situated for the day and see if there is
24 anything that needs immediate attention.

25 Okay, anything else?

1 *MR. FEICHT:* Your Honor, two issues. First, like we
2 did for Professor Tracy, it would be helpful if we knew which
3 exhibits are going to be used so we could determine which
4 exhibits would be necessary -- it is difficult in the abstract.
5 So we ask, as we have done in the past, we get the exhibits in
6 such time to analyze the objections and have time for
7 conferral.

8 *THE COURT:* Has the Plaintiff already assessed the
9 exhibits that you would be introducing through Diane Alperin?

10 *MR. BENZION:* Based on the testimony this week and
11 anything else we haven't considered, I will know tomorrow. I
12 definitely plan to tell opposing counsel what exhibits to
13 expect coming up in Diane Alperin's testimony.

14 *THE COURT:* When is a realistic reasonable time
15 opposing counsel can expect an email from you?

16 *MR. BENZION:* By mid-day Sunday.

17 *THE COURT:* I don't think that leaves a lot of time
18 for conferral.

19 *MR. BENZION:* I have to prepare a memo with respect to
20 Exhibit 2. I intend to do that tonight and tomorrow so it is
21 filed in advance of the testimony on Monday in the event --

22 *THE COURT:* Which Exhibit 2, Plaintiff's or Defense?

23 *MR. BENZION:* Plaintiff's Exhibit 2 is the notes that
24 Plaintiff is required to brief the Court --

25 *THE COURT:* Right.

1 MR. BENZION: In fairness to the other side, I do have
2 a preliminary list that I can provide them prior to Sunday and
3 get them something more final the next day.

4 THE COURT: Can you do it by sometime tonight to give
5 them the preliminary list?

6 MR. BENZION: If I could do it tomorrow, and get
7 something final over on Sunday.

8 MR. FEICHT: That is fine.

9 THE COURT: By tomorrow morning, any time before
10 twelve o'clock, you get the preliminary list to opposing
11 counsel, and by noon Sunday, if there is anything added, you
12 get it to them on Sunday.

13 Anything else?

14 MR. FEICHT: The second issue, your Honor, we did
15 during our prior status conference preliminarily discuss which
16 witnesses will be offering which testimony. Several witnesses
17 will talk about what was said at the faculty senate meeting.

18 Given that is hearsay and 403 as well, we want
19 confirmation we can tell these witnesses that they don't need
20 to show up, Mr. DeRosa in particular because of his son's
21 death. The issue is only discussing the faculty's senate
22 meeting --

23 THE COURT: Why don't we let Plaintiff tell us which
24 witnesses can be -- if any, that they know are not going to be
25 called in light of the number of rulings the Court has made

1 regarding the senate faculty meeting.

2 *MR. BENZION:* I disagree with Mr. Feicht's
3 representation of the ruling. The Court did rule that we could
4 question relevant professors regarding their feelings at this
5 time, and these professors were at the senate faculty meeting,
6 but they are generally at the school, have understandings and
7 concerns and confusion about the policy.

8 *THE COURT:* The witnesses have testimony other than
9 the senate faculty meeting?

10 *MR. BENZION:* Correct.

11 *THE COURT:* Again, there is a cumulative cautionary
12 instruction I have given both sides, but particularly to the
13 Plaintiff. We haven't gotten there yet, but you haven't put on
14 anybody, other than the one witness, other than Dr. Tracy. But
15 I do think -- and I get the sense that you obviously would have
16 the right if you properly served Mr. DeRosa, but you should be
17 mindful in thinking through the strategy of the case over the
18 weekend and how things are going, and what some of the Court's
19 rulings are.

20 If you can, sooner rather than later, make a
21 determination about witnesses not needing to be called, I think
22 you should do that. That is the right thing to do for the
23 witnesses.

24 I don't know, given you haven't deposed a lot of the
25 witnesses, how you are assessing who is -- presumably you have

1 some knowledge what they would say because you put them on the
2 witness list, but I am not going to have a parade of witnesses
3 coming in and saying the same thing. That is the cumulative
4 part of it.

5 Give it some thought, and if you do come to some
6 conclusion about Mr. DeRosa over the weekend, communicate that
7 to the Defense to let them know. Until then, he is expected to
8 be called. There is a level of sensitivity, if you come to a
9 point that you do not need him, he in particular should be
10 notified -- I guess Defense counsel doesn't really represent
11 him, but they do have the ability to be in touch with him.

12 *MR. BENZION:* Yes.

13 *MR. FEICHT:* Could we have more specificity besides
14 Dr. Tracy and Dr. Coltman who will be coming?

15 *MR. BENZION:* We are in communication with witnesses.
16 Specifically with respect to Mr. DeRosa, he did communicate
17 with my office -- Mr. Medgebow's office today. We attempted
18 to have my assistant communicate with him, he said he had
19 availability on Wednesday. And we were in communication with
20 another professor today about coming, not expecting to be here
21 on Monday, but rather on Tuesday.

22 There is ongoing communication with these witnesses to
23 give them proper expectations.

24 *THE COURT:* Yes, we want to always have a witness here
25 ready to go so we don't have down time. We don't want ten,

1 five people waiting outside.

2 I sense from the way you have done your trial plan, my
3 sense is that we would be in good shape and we would have
4 accomplished quite a bit if we got through Diane Alperin and
5 Heather Coltman on Monday. I suppose that is possible, but I
6 don't know how likely the way you made your trial plan. I do
7 not think that we will get to anyone beyond that.

8 The next two, Alperin and Coltman?

9 MR. BENZION: That is the plan. I cannot believe we
10 are going to get through Alperin and Coltman on Monday.

11 THE COURT: Coltman should be on notice she may be
12 been called up on Monday.

13 MR. BENZION: We have been in communication with
14 counsel.

15 MR. FEICHT: Can we get clarity? I am looking at an
16 email that he was told to show up Monday and he teaches class
17 on Monday. If we could know, other than Dean Coltman and
18 Alperin, if there is anybody else so we can tell them so we
19 have a sense of who is coming on Monday. That is all I am
20 asking you.

21 MR. LEO: We spoke with opposing counsel, I think
22 there may be miscommunications on the other side, I believe it
23 was with Ms. Griffin, we would not be calling professor --

24 THE COURT: This can be off the record.

25 Look, here is what we'll say, Coltman and Alperin are

1 up on Monday. No one else should be expected to come on
2 Monday.

3 *(Thereupon, the hearing was concluded.)*

4 * * *

5 I certify that the foregoing is a correct transcript
6 from the record of proceedings in the above matter.

7
8 Date: December 26, 2017

9 /s/ Pauline A. Stipes, Official Federal Reporter

10 Signature of Court Reporter
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Pauline A. Stipes, Official Federal Reporter

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